Vol. I

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 336.

TOLEDO SCALE COMPANY, PETITIONER,

vs.

THE COMPUTING SCALE COMPANY.

No. 337.

PETITION AND APPEAL OF THE COMPUTING SCALE COMPANY OF DAYTON, OHIO, AND THE COMPUTING SCALE COMPANY OF CANADA, LIMITED, PETITIONERS,

vs.

THE TOLEDO SCALE COMPANY.

PETITIONS FOR WRITS OF CERTIORARI AND APPEAL FILED JUNE 30, 1916.

(28,846)

(28,928)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 339.

TOLEDO SCALE COMPANY, PETITIONER,

vs.

THE COMPUTING SCALE COMPANY.

No. 388.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

THE COMPUTING SCALE COMPANY AND TOLEDO SCALE COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit, on the fourth day of October, 1921, of the October term, in the year of our Lord one thousand nine hundred and twenty-one, and of our Independence the one hundred and forty-sixth.

And afterwards, to-wit: On the tenth day of February, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, February 10, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon reading and filing the verified petition of The Computing Scale Company, Appellee herein, and good cause appearing thereby, It is ordered that the Toledo Scale Company, Appellant herein, be and appear before this court on the twenty-first day of February, 1922, at the hour of ten o'clock A. M. and show cause
2 why it, Toledo Scale Company, should not be adjudged in contempt of this court by reason of the filing of its bill of complaint and the obtaining of the temporary restraining orders without notice, and the application for a temporary injunction in the case of Toledo Scale Company, Plaintiff, against The Computing Scale Company and others, Defendants, in the District Court of

the United States for the Northern District of Ohio, Western Division, and why it, Toledo Scale Company, should not be enjoined from taking any further proceedings in said case last mentioned or upon said temporary restraining orders or upon said application for a preliminary injunction, and

It is further ordered that the Fidelity and Deposit Company of Maryland and the United States Fidelity and Guaranty Company, Defendants in said case last mentioned, at said time above mentioned, show cause why they and each of them should not be enjoined from further proceedings upon their petition for affirmative relief in said case last mentioned, and to interplead The Computing Scale Company, and why the mandate of this court should not contain a direction to the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter summary judgment upon the supersedeas bond filed in this case in this court and the supersedeas bond filed in the case of The Computing Scale Company, now Toledo Scale Company, now on appeal in this court.

And afterwards, on the same day, to-wit: On the tenth day of February, 1922, in the October term aforesaid, there was filed in the office of the clerk of this court a certain Petition of The Computing Scale Company, which said Petition is in the words and figures following, to-wit:

3 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Petition of the Computing Scale Company.

John M. Zane, Drury W. Cooper, Counsel for The Computing Scale Company.

Filed Feb. 10, 1922.

EDWARD M. HOLLOWAY,
Clerk.

4 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Petition of the Computing Scale Company.

The Computing Scale Company, appellee, above named, respectfully represents:

1. That on October 4, 1921, this Court made and entered its judgment in the above cause, affirming the final decree of the United States District Court for the Northern District of Illinois, Eastern Division, in the cause wherein The Computing Scale Company was plaintiff and Toledo Scale Company, formerly Toledo Computing Scale Company, was defendant, in Equity, No. 30024; that said cause involved the infringement by the Toledo Scale Company of Reissued Letters Patent No. 11536; that said final decree had adjudged in favor of The Computing Scale Company the recovery of the profits of the Toledo Scale Company arising from said infringement in the sum of $420,883.44 with costs and the said Toledo Scale Company had filed in said District Court for the Northern
5 District of Illinois, Eastern Division, a supersedeas bond with the Fidelity and Deposit Company of Maryland and the United States Fidelity and Guaranty Company as sureties thereon in the sum of $450,000; that upon said judgment of affirmance the Toledo Scale Company obtained from this Court on November 2, 1921, an order staying this Court's mandate until the further order of this Court, and said order was granted to allow a petition of Toledo Scale Company for writ of certiorari upon said judgment of affirmance of this court to be filed in the Supreme Court of the United States; that to secure said stay of mandate said Toledo Scale Company filed under the order of this Court an additional supersedeas bond in the sum of $50,000 with the said Fidelity and Deposit Company of Maryland as surety thereon; that on December 30, 1921, the Toledo Scale Company filed in the said Supreme Court the record of the said District Court for the Northern District of Illinois, Eastern Division, and of this Court in said cause, and on January 3, 1922, presented its said petition in said Supreme Court, which said petition was by said Supreme Court denied on January 9, 1922, and this Petitioner has now in the possession of its counsel, and presents to this Court, a certified copy of the said order denying

said petition, and said cause is now pending in this Court upon the order of this Court staying the mandate.

2. That by a prior decree made and entered on June 24, 1912, the said District Court of the Northern District of Illinois, Eastern Division, had adjudged validity and infringement of said Reissued Patent No. 11536 and of another patent, both patents being sued upon by The Computing Scale Company in said suit, and an appeal was taken from said prior decree to this Court, and on January 21, 1913, said prior appeal upon said two patents was pending in this Court and set for hearing upon said last named day, and on said day the Toledo Scale Company, prior to the argument of said appeal presented to this Court its petition in the nature of a bill of
6 review and supported the same by affidavits filed therewith, and by an exhibit of scales; that the ground of said bill of review was certain alleged newly discovered evidence as to the prior manufacture, sale and use of Phinney scales claimed to anticipate said Reissued Patent No. 11536 sued upon and to make the same invalid and the said exhibit of scales was of such alleged Phinney scales; that the relief sought by said bill of review was leave to dismiss its appeal from that part of the decree appealed from adjudging the validity of said Reissued Patent No. 11536, with leave to said District Court to reopen the cause and receive such alleged newly discovered evidence; that after argument of counsel, this Court made its order denying said petition for review, and thereupon, on January 21, 1913, said appeal was argued and on April 15, 1913, said Reissued Patent No. 11536 was held by this Court to be valid and infringed, and said other patent was held invalid, and the decree appealed from was reversed with directions to the said District Court to allow The Computing Scale Company to offer proof of title to said Reissued Patent No. 11536, and for further proceedings thereon; that within the time allowed by this Court for a rehearing, the Toledo Scale Company, on May 14, 1913, presented to this court its second application in the nature of a bill of review supported by affidavits as aforesaid, and also by an exhibit of said Phinney scales, praying this Court to include in its mandate a direction to the said District Court of the Northern District of Illinois, Eastern Division, to reopen said cause upon said alleged newly discovered evidence as to said Phinney scales, being substantially the alleged newly discovered evidence set forth in said first bill of review, and this Court denied said application on May 14, 1913.

3. That thereafter such proceedings were had, in said District Court of the United States for the Northern District of Illinois, Eastern Division, that said proof of title was offered and a
7 decree adjudging validity of said patent was made and entered on May 6, 1914, and said decree ordered a reference to a Master upon an accounting, and thereafter such accounting was had, and upon the report of said Master the final decree hereinbefore mentioned was entered in said District Court on March 5, 1919, for $420,883.44 against said Toledo Scale Company, and upon appeal

to this Court said decree was affirmed as hereinbefore stated; that upon said last appeal from said final decree, said Toledo Scale Company presented to this Court a further application which this Court considered as an application in the nature of a ill of review, whereby upon the said affidavits of 1913 incorporated in the record and upon depositions of certain witnesses making said affidavits and others, which depositions had been presented to said Master and said District Court, and upon the said exhibit of scales identified in the depositions as Providence Exhibits 1, 2, 3, 4, and upon certain exhibits of advertising as to said Phinney scales, the Toledo Scale Company prayed this Court to set aside its former judgment of April 15, 1913, and the decree of said District Court of May 6, 1914, and the final decree of said District Court of March 5, 1919, upon such alleged newly discovered evidence, and upon alleged evidence of concealment thereof by The Computing Scale Company contained in said affidavits, supported by said depositions and exhibit of scales, and the Toledo Scale Company contended that said affidavits of 1913 showed that The Computing Scale Company had concealed and suppressed such newly discovered evidence, although fully informed of it, and had imposed upon the Toledo Scale Company and upon said District Court and this Court by such suppression and concealment; that this Court, in its opinion affirming said final decree rendered October 4, 1921, denied said third application in the nature of a bill of review.

4. And your petitioner now respectfully represents that the following proceedings have been taken by the Toledo Scale
8 Company purely by way of a vexatious suit to harass The Computing Scale Company, and deprive it of the benefit of said judgment of affirmance in this Court, and of said judgments dismissing said bills of review in 1913 and 1921, and to deprive it of the fruits of the said final decree of the said District Court of the Northern District of Illinois, Eastern Division, so affirmed by this Court, now pending on appeal in this Court;

That upon January 9, 1922, the day the said petition for writ of certiorari was denied in said Supreme Court of the United States and while said order staying mandate of this Court was in force, the Toledo Scale Company filed in the District Court of the United States for the Northern District of Ohio, Western Division, its bill of complaint to enjoin The Computing Scale Company from taking any steps to enforce said final decree of said District Court of the United States for the Northern District of Illinois, Eastern Division, affirmed in this Court; that the ground of said bill of complaint was alleged concealment and suppression by The Computing Scale Company of certain Phinney scales prior to the year 1910; and with said bill of complaint the Toledo Scale Company filed affidavits, being in substance the affidavits of 1913 filed in this Court, and thereupon on January 9, 1922, caused said District Court of the Northern District of Ohio, Western Division, to issue a temporary restraining order without notice upon a bond of $1,000 enjoining any action by The Computing Scale Company, and said order contained an

order for The Computing Scale Company to show cause on January 19, 1922, why temporary injunction should not issue as prayed in said bill of complaint; and on January 11, 1922, and on January 19, 1922, the Toledo Scale Company filed amendments to said bill and on said January 11, 1922 secured another temporary restraining order without notice upon a new bond of $1,000; that true copies of said bill of complaint, of said amendments thereto and of said temporary restraining orders are presented herewith, marked Exhibit I and made a part of this petition, and said temporary restraining orders enjoined proceedings upon said final decree of said District Court for the Northern District of Illinois, Eastern Division, affirmed by this Court; that said bill of complaint contains no grounds and does not pray, to set aside the three judgments of this Court denying said former bills of review in this Court.

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5. That on January 19, 1922, the return day of said restraining order and order to show cause, The Computing Scale Company showed cause by a special appearance and filed a verified answer supported by affidavits upon such special appearance, which said answer contained (1) objections to the jurisdiction of said court, (2) exceptions to said bill, (3) a motion to dismiss said bill of complaint on the ground of no cause shown for equitable relief and also (4) on the ground of laches, (5) a plea of res judicata as to the matters set forth in said bill, and (6) an answer together with Exhibits A, B and C to said plea of res judicata, Exhibit A to said plea being the opinion of this court of April 15, 1913, Exhibit B to said plea being the affidavits filed in this Court on May 14, 1913, upon the second bill of review printed in parallel columns with the affidavits filed with the bill of complaint filed in said District Court for the Northern District of Ohio, Western Division, which latter affidavits are practically the same as said first affidavits, and Exhibit C being the opinion of this Court of October 4, 1921, and said Exhibit B to said plea shows the issue on the bills of review in this Court and the issue on this bill of complaint to be one and the same, and in said plea in said answer the contention as to concealment and suppression of evidence and imposition on the court is set forth as contained in the brief of the Toledo Scale Company in 1921, filed in this Court upon the hearing upon appeal from said final decree, and as contained in the petition for writ of certiorari filed in said Supreme Court of the United States; that true copies of said answer and supporting affidavits and further counter affidavits are presented herewith, marked Exhibit II, and made a part hereof, together with the said exhibits to said answer; that said The Computing Scale Company made no motion except to present the motion to dismiss the bill of complaint as the same is contained in said answer and made no motion whatever to set aside or dissolve said temporary restraining order.

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6. That on January 19, 1922, the said Toledo Scale Company filed additional affidavits which are presented herewith by true copies as Exhibit III and made a part hereof, and on January 27, 1922,

filed additional affidavits which are presented herewith by true copies as part of Exhibit III.

7. That on January 20, 1922, as of January 19, 1922, the said District Court of the Northern District of Ohio, Western Division, made and entered its order continuing said temporary restraining order in force for an additional ten days, a true copy of which order is presented herewith, marked Exhibit IV and made a part hereof.

8. That on January 20, 1922, the Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company filed in said District Court for the Northern District of Ohio, Western Division, their joint answer and petition for affirmative relief whereby said bonding companies submitted to the jurisdiction of said court and said answer and petition for affirmative relief by true copy is presented herewith, marked Exhibit V and made a part hereof; that thereby said bonding companies last named showed an understanding with the Toledo Scale Company to support said jurisdiction of said District Court for the Northern District of Ohio, Western Division, and to submit to said jurisdiction and to attempt to interplead The Computing Scale Company and the Toledo Scale Company and to resist liability on the supersedeas bonds given to secure said decree.

11 9. That on January 24, 1922, The Computing Scale Company presented to said District Court for the Northern District of Ohio, Western Division, the parts of the record in said cause in said Supreme Court of the United States, showing said prior adjudications by this Court, the brief of the Toledo Scale Company upon the second appeal in this Court urging concealment and suppression of evidence as ground for setting aside the former judgment of this Court and the decrees of said District Court of the Northern District of Illinois, Eastern Division, and the petition for a writ of certiorari and brief in support thereof of said Toledo Scale Company, filed in the Supreme Court of the United States, setting forth concealment and suppression of evidence as one of the grounds of error to the judgments of this Court, and The Computing Scale Company filed a brief of its counsel upon the said matter of res judicata, in its said answer, according to the statement of said Court as to what it desired a brief upon.

10. That on January 28, 1922, The Computing Scale Company filed in said District Court for the Northern District of Ohio, Western Division, its answer to the petition for affirmative relief of said bonding companies named above, in which answer it moved to dismiss said petition as stating no ground for relief, and its answers to the first and second amendments of said Toledo Scale Company to said bill of complaint preserving its special appearance and former objections, true copies of which said answers are presented herewith, marked Exhibit VI and made a part hereof.

11. That on January 28, 1922, the said District Court of the Northern District of Ohio, Western Division, made and entered its

order continuing said temporary restraining order in full force until and including February 7, 1922, and to said order The Computing Scale Company objected and excepted on the ground that said court had no jurisdiction to enter said order, and had no power to
12 enter said order, and that the said order was contrary to Equity Rule No. 73, and to Section 17 of the Act of Congress of October 15, 1914; that a true copy of such order is presented herewith and made a part hereof as Exhibit VII, together with a true copy of a memorandum filed by said Court with said order.

12. That on January 28, 1922, the said Toledo Scale Company filed in said last named Court a motion for an order directing The Computing Scale Company to file herein all exhibits introduced by said The Computing Scale Company in evidence in the case of The Computing Scale Company vs. Toledo Scale Company, No. 30024, in the United States District Court for the Northern District of Illinois, Eastern Division, and your Petitioner alleges that said exhibits constitute a part of the record filed in this Court; that on February 7, 1922, the said District Court for the Northern District of Ohio, Western Division, made and entered its further order extending said temporary restraining order to and including February 13, 1922, a true copy of which order is presented herewith as part of said Exhibit VII together with a true copy of an additional affidavit filed by said Toledo Scale Company on said February 7, 1922.

13. That this Court at all times since said second appeal was perfected, has had and still has jurisdiction of this cause with full power to receive and consider any petition or application or bill in the nature of a bill of review on the ground set forth in the said bill of complaint filed in said District Court of the Northern District of Ohio, Western Division, or on any grounds; that the filing of said bill of complaint and the obtaining of said temporary restraining orders by said Toledo Scale Company in said United States District Court for the Northern District of Ohio, Western Division, constitute and are a violation of the jurisdiction of this Court to finally adjudicate all relief in regard to said matters passed upon by this Court in its judgment affirming said final decree of the District Court for
13 the Northern District of Illinois, Eastern Division, and are a fraud upon the jurisdiction of this Court, and are taken for the purpose of presenting to said District Court of the Northern District of Ohio, Western Division, a pretended suit for relief based solely upon grounds that have already been fully adjudicated by this Court upon the merits thereof, and a pretended litigation in said District Court for the Northern District of Ohio, Western Division, by making parties to the bill residents of said District, who are not necessary or proper parties, in order to give said Court jurisdiction over The Computing Scale Company, and said proceedings are an abuse of the order of this Court granting a stay of mandate and are a contempt of the process and authority of this Court by said Toledo Scale Company.

14. That said District Court for the Northern District of Ohio, Western Division, has announced that it is the intention of the Court to continue said temporary restraining order in force and to appoint a special Master to take oral evidence upon said motion for a temporary injunction; that if said appointment be made, the said Toledo Scale Company will, as it was stated by its counsel it intends to do, take such oral testimony in various places in the United States, and will compel The Computing Scale Company to attend thereon and will prolong this litigation upon an issue already adjudicated by this Court, but whether said special Master upon the motion for a preliminary injunction be appointed or not The Computing Scale Company for a great length of time will be deprived of the fruits of a litigation which has already extended from 1910 to 1922, and will be exposed to great and irreparable loss, damage and injury.

15. That for the wrongs aforesaid this petitioner can apply for redress to no other court than this Court where said cause is now pending; that by law the jurisdiction of the Supreme Court of the United States, by writ of prohibition or by injunction against parties,
14 is confined to cases in aid of its original or appellate jurisdiction, and that by law the jurisdiction of the United States Circuit Court of Appeals for the Sixth Circuit is confined to cases in aid of its appellate jurisdiction, and that the said cause in the District Court for the Northern District of Ohio, Western Division, is not within the appellate jurisdiction of said Supreme Court of the United States and the jurisdiction of said Circuit Court of Appeals for the Sixth Circuit, cannot be invoked in regard to a cause that may in the future be appealed to said Court, but only as to cases pending in said Court, and this cause is not pending in said Circuit Court of Appeals of the Sixth Circuit and will not be pending until the said District Court for the Northern District of Ohio, Western Division, grants or refuses a preliminary injunction and an appeal therefrom be taken; that the District Court of the United States for the Northern District of Illinois, Eastern Division, will not be able to resume jurisdiction of this decree until the mandate has been issued by this Court.

16. That this Court by statute has jurisdiction by writ of scire facias or by petition in the nature of a scire facias, to include in its mandate a direction to said District Court of the Northern District of Illinois, Eastern Division, to enter summary judgment against said principal and sureties upon the said supersedeas bonds filed in this cause, and this Court has jurisdiction in aid of its appellate jurisdiction now existing over said cause pending in this Court, to enjoin the Toledo Scale Company from further proceeding with its suit in said District Court of the United States for the Northern District of Ohio, Western Division, and to prevent said Fidelity and Deposit Company of Maryland and said United States Fidelity and Guaranty Company from seeking to interplead The Computing Scale Company in the said suit in said last named Court.

Wherefore, The Computing Scale Company prays that this Court may issue an order against said Toledo Scale Company re-
15 quiring it to appear before this Court on a day and hour to be fixed, and show cause why it should not be adjudged in contempt of this Court by reason of the filing of said bill of complaint and the obtaining of said temporary restraining orders without notice, and the application for said temporary injunction, all in the District Court of the United States for the Northern District of Ohio, Western Division, and show cause why it should not be enjoined from further proceedings upon said bill of complaint and upon said restraining orders in said last named court and against said Fidelity and Deposit Company of Maryland and said United States Fidelity and Guaranty Company to show cause why they and each of them should not be enjoined from further proceedings upon their petition to interplead and why the mandate of this Court should not contain a direction to the said lower court to enter summary judgment upon the said supersedeas bonds, and that upon the hearing of the said order to show cause, The Computing Scale Company may have such relief against said Toledo Scale Company and said Fidelity and Deposit Company of Maryland and said United States Fidelity and Guaranty Company as to equity belongs and as to the law appertains and as to this Court shall seem meet.

THE COMPUTING SCALE COMPANY,

By —— ——,
President.

——— ———,
Counsel for The Computing Scale Company.

16 STATE OF ILLINOIS,
County of Cook, ss:

Samuel M. Hastings, having been on oath first duly sworn, says that he is the President of The Computing Scale Company, the Petitioner herein; that he has read the foregoing petition and knows its contents and that the facts therein stated are true.

——— ———.

Subscribed and sworn to before me this — day of ——, 1922.

——— ———,
Notary Public.

17 And afterwards, on the same day, to-wit: On the tenth day of February, 1922, in the October term aforesaid, there were filed in the office of the clerk of this court certain "exhibits to petition of the Computing Scale Company," which said Exhibits are in the words and figures following, to-wit:

18 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

On appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

EXHIBITS TO PETITION OF THE COMPUTING SCALE COMPANY.

John M. Zane, Drury W. Cooper, Counsel for The Computing Scale Company.

Filed Feb. 19, 1922.

EDWARD M. HOLLOWAY,
Clerk.

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Affidavit of George Walker.....
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Affidavit of Albert H. Meads.....
Affidavit of Herman C. Singer.....
Affidavit of Ira Chase Koehne.....
Affidavit of Border Bowman.....
Affidavit of Paul A. Staley.....
Affidavit of Edward Rector.....

20 Exhibit IV:

Order of January 19, 1922, continuing restraining order.

Exhibit V:

Answer and petition of surety companies.....

Exhibit VI:

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Answer to The Computing Scale Company to petition of surety companies .....

Exhibit VII:

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EXHIBIT I.

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Bill of Complaint.

1. The plaintiff, Toledo Scale Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and is a citizen and a resident of said State.

The defendant, The Computing Scale Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio and is a citizen and a resident of said State and of the Southern Federal Judicial District thereof, having its principal office and place of business in the City of Dayton, County of Montgomery, in said Southern District of said State.

The defendant Fidelity and Deposit Company of Maryland is a corporation organized and existing under and by virtue of the laws of the State of Maryland and is a citizen and resident of said State.

Each of the defendants, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, and Northern National Bank of Toledo, Ohio, is a national banking association established under the laws of the United States, and each of said three defendants is located at the City of Toledo, in the Western Division of the Northern Federal Judicial District of the State of Ohio, and each of said defendants is, for the purpose of such an action as this, by law required to be deemed a citizen of said State of Ohio, and each of said three defendants is a resident of the said Western Division of said Northern District of said State.

The defendant, The Commerce-Guardian Trust and Savings Bank, is a corporation organized and existing under and by virtue of the laws of the State of Ohio as a savings bank and trust company, and has its principal place of business at the City of Toledo in the Western Division of the Northern Federal Judicial District of said State, and is a citizen of said State and a resident of the Western Division of said Northern District of said state.

The defendant, The Guardian Savings and Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio as a savings bank and trust company, and has its principal place of business at the City of Cleveland, Ohio, in the Eastern Division of the Northern Federal Judicial District of said State, and is a citizen and a resident of said State of Ohio.

2. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Five Thousand Dollars ($5,000.00).

3. The name of the plaintiff, Toledo Scale Company, was formerly Toledo Scale & Cash Register Company and afterwards Toledo Computing Scale Company, and under its said former name and its present name plaintiff has been continuously since July 12, 1901, and now is engaged in the manufacture of computing scales, and among other kinds of computing scales plaintiff has manufactured and for a number of years has had a large and increasing business in the manufacture of a computing scale of which one of the component parts was a cylinder carrying figures indicating weights and values. The defendant, The Computing Scale Company, has also for many years been engaged in the manufacture of computing scales, including scales having as a component part thereof a cylinder carrying figures indicating weights and values; and plaintiff and said defendants have been competitors in the production of computing scales for many years.

The defendant The Computing Scale Company since some time prior to 1901 has been continuously engaged in an effort to
23 monopolize, in violation of the laws of the United States, the business of manufacturing computing scales and as soon as plaintiff began to compete with it, said defendant in pursuance of its attempt and purpose to monopolize aforesaid formed and entered into a conspiracy to which its officers and directors and Moneyweight Scale Company were parties, the design and purpose of which was to ruin plaintiff and drive it out of business, in pursuance of which it did all of the several acts and things hereinafter set forth.

4. In the year 1902 and for several years thereafter, the defendant, The Computing Scale Company, was engaged in the manufacture of a computing scale which was so arranged and constructed as to give the dealer or person using same for weighing the amount and computing the price of goods sold an unfair and dishonest advantage over the persons purchasing on the basis of such computation. Said defendant manufactured large numbers of said dishonest scales and in the effort to overcome the competition offered by the honest and fair scales manufactured and sold by plaintiff said defendant advertised and caused and permitted the Moneyweight Scale Company of Chicago, its general distributor of said scales, and the respective agents and salesmen of itself and of said company to advertise the fact of the dishonest advantage which the users of such scales would have by reason of the construction thereof. One of said advertisements was to the effect that one dealing in meat might buy meat at nine cents a pound, retail the meat to his trade at the same price and get his money back, and a three per cent profit besides. Plaintiff exposed the unfair and dishonest character of the said make of scales so manufactured and sold by said defendant, The Computing Scale Company, with the result of greatly increasing the malicious hatred of said The Computing Scale Company for plaintiff and of intensifying its efforts to bring about plaintiff's ruin in pursuance of the conspiracy hereinbefore set forth. There-

after said The Computing Scale Company sought to obtain an injunction to restrain this present plaintiff from further distributing such circulars. Said suit was filed in the United States Circuit Court for the Southern District of Ohio, and was heard on appeal by the United States Circuit Court of Appeals for the Sixth Judicial Circuit, which held that this plaintiff should not be restrained from putting out said circulars exposing the dishonesty of said make of scale made by said defendant, The Computing Scale Company, for the reason, in substance, that the said scales were in fact dishonest. Said decision of the Circuit Court of Appeals is reported in Vol. 142 Federal Reporter, page 919, and a subsequent decision of the District Court to the same effect was rendered June 30, 1914, which has not been published, and plaintiff makes reference thereto for greater particularity.

5. In further pursuance of said conspiracy and design said The Computing Scale Company claimed and advertised in the years 1902 to 1905 that a certain so-called "fan" scale manufactured by plaintiff was an infringement of one manufactured by said defendant and that plaintiff's said scale was an imitation and that said defendant's scale was the original, whereas the plaintiff's said scale was in fact the original and defendant's said scale the imitation; and said defendant further brought a number of suits against plaintiff and its customers in the year 1905 for said alleged infringement and widely advertised the bringing of such suits, but finally dismissed same or permitted them to be dismissed without trial; and in further pursuance of said malicious and wrongful conspiracy and design said defendant in the years 1907 and 1910 instituted the suits for alleged infringement of patents against this plaintiff hereinafter set forth, well knowing said suits to be based upon false and fraudulent claims; and in *and in* connection with said suits was guilty of the fraudulent acts and conduct hereinafter related; and solely by reason of said fraudulent conduct and imposition upon and deception of the courts and this plaintiff, said defendant obtained (as hereinafter more fully set forth) a judgment against this plaintiff in the amount of Four Hundred Twenty Thousand Eight Hundred Eighty-Three and 44/100 ($420,883.44) Dollars for infringement of a certain patent of which said The Computing Scale Company claimed to be the owner. Said defendant, The Computing Scale Company, knew, at all times, that it was prosecuting said litigation against this plaintiff, that its said patent was invalid and that if the evidence which it had suppressed and kept from this plaintiff and from said courts had not been so suppressed, that said courts would not and could not have found the said judgment or any judgment in favor of said The Computing Scale Company and against this plaintiff on said claim of infringement.

6. The suits commenced by said The Computing Scale Company against this plaintiff, with the malicious design and conspiracy and purpose hereinbefore set forth, consisted of two suits commenced in the year 1907 filed in this court, one alleging infringement of Reissue Patent No. 11536 and the other of

Original Patent No. 597,300, and of a suit filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on or about May 23, 1910, based on both of said patents. The said suits begun by said The Computing Scale Company in this court were permitted by that company to pend for several years without any evidence being taken and without any decree being entered. Plaintiff is informed and believes and therefore avers that said suits were not pressed by said The Computing Scale Company for the reason that it had not then succeeded in obtaining possession of and making arrangements for the suppression of the evidence which demonstrated the falsity of its said claims of which evidence said defendant The Computing Scale Company had knowledge as hereinafter set forth.

7. On or about October 5, 1901 said defendant, The Computing Scale Company brought suit against the Federal Scale Company in the United States Circuit Court for the Eastern District of Pennsylvania, alleging infringement of certain letters patent by said Federal Scale Company, including said re-issue letters patent No. 11536, dated April 28, 1896 and original letters patent No. 597,300 dated January 11, 1898, each granted to Albert U. Smith. In said suit the defendant, The Federal Scale Company in its answer set up, among other defenses, letters patent of the United States No. 106,869, granted August 30, 1870 to William H. Phinney, and alleged a prior invention and use by said Phinney of scales embodying the inventions of the patents sued upon, including said reissued Patent No. 11536. In said cause, depositions were taken showing the manufacture and sale by said Phinney of scales under his patent above mentioned, and three of said Phinney's scales were produced and introduced in evidence. Said reissued patent No. 11536 relied upon by The Computing Scale Company purported to be a patent of a light weight cylinder. Said patent had been taken out by one Smith and the novelty of said Smith patent was claimed to be in the fact that the cylinder was to be of a skeleton construction covered with light weight material, and the cylinder and covering to be of very light weight. The said Phinney patent covered a cylinder but did not prescribe that it should be light; but the scales actually manufactured by said Phinney and put in use, and three of which
26 were exhibits produced and identified in the evidence in said case in the Eastern District of Pennsylvania, in fact embodied a light weight skeleton cylinder substantially identical with that called for by the Smith patent. Said manufacture of said computing scale with said light weight cylinder by said Phinney was a complete anticipation of the claims of said reissued patent of said Smith upon which The Computing Scale Company relied, and said evidence constituted and was a complete defense on behalf of said The Federal Scale Company against said claims of The Computing Scale Company, and was so recognized by said The Computing Scale Company and its counsel in said suit. After said depositions were taken and said Exhibits produced by the defendant in said suit the complainant did not prosecute said suit against said The Federal Scale Company further, and its counsel and counsel for The Federal Scale

Company entered into a stipulation by which stipulation the proofs and exhibits in said case were not filed of record but were to be left in the custody of the counsel for the party on whose behalf they were presented respectively. Threafter the said exhibits were turned over by counsel for said Fderal Scale Company to one of counsel for said The Computing Scale Company, defendant herein, and remained and were in the possession of said counsel for said The Computing Scale Company, as plaintiff is informed and believes and therefore avers for a number of years and until long after the time had expired within which this plaintiff as defendant could introduce evidence in said suit by The Computing Scale Company against this plaintiff as defendant in the United States District Court for the Northern District of Illinois, Eastern Division. Said defendant herein, The Computing Scale Company, ultimately dismissed or permitted the dismissal of its bill of complaint against The Federal Scale Company, without submitting the merits of its claims on said patents in said suit.

8. In the year 1901 the defendant herein, The Computing Scale Company, instituted a suit upon the Smith patents hereinabove mentioned and another against one Richard T. Randall in the Circuit Court of the United States for the Eastern District of Pennsylvania. In that case, also an answer was filed setting up the said Phinney patent 106,869 and alleging a prior invention and use by said Phinney and others of scales embodying the invention of the patents sued upon, and said The Computing Scale Company abandoned said litigation without ever bringing the same to trial.

27 9. After said depositions had been taken and said exhibits had been produced in said suit in the Eastern District of Pennsylvania against The Federal Scale Company, which was in the year 1902, the solicitors and counsel for said The Computing Scale Company in said suit, as plaintiff is informed and believes and therefore avers, refused to prosecute said suit further on its behalf and declined to bring further suits on behalf of said The Computing Scale Company based on alleged infringements of said Smith reissued patent No. 11536, and as plaintiff is informed and believes and therefore avers, said counsel advised said The Computing Scale Company that no suit for alleged infringement of said patent could be successfully maintained because of the prior manufacture, use and sale of said computing scales with light weight skeleton cylinders under the Phinney patent hereinbefore mentioned. Said suits in the Eastern District of Pennsylvania were dismissed in 1913.

10. About the year 1906 plaintiff herein engaged in the manufacture of a cylinder computing scale using a light weight skeleton cylinder, and thereupon said defendant The Computing Scale Company claimed and advertised that said scale so manufactured by this plaintiff was an infringement of patents owned by said defendant The Computing Scale Company, and said defendant The Computing Scale Company shortly thereafter filed suit in the United States District Court for the Northern District of Ohio, Western Division

against this plaintiff as defendant, alleging that plaintiff by the manufacture of said scale was infringing patents owned by said The Computing Scale Company, including said Smith reissued patent No. 11536. The pendency of said action was widely advertised by said The Computing Scale Company in pursuance of said conspiracy and design to injure and destroy plaintiff's business, but said action was not brought to trial. Said suit was not brought by the solicitors who had represented said The Computing Scale Company in said suit in the Eastern District of Pennsylvania. While same was pending, said The Computing Scale Company, through its officers, agents and representatives in further pursuance of said conspiracy secretly engaged in an effort to find all of the Phinney scales which had been manufactured with said light weight skeleton cylinder and which were not already in its factories and in the custody of said Company's counsel in said case against The Federal Scale Company, and said The Computing Scale Company did locate
28 and secretly purchase and take into its possession a number of said Phinney scales, the exact number being to this plaintiff unknown but well known to the defendant The Computing Scale Company. Said scales so purchased and taken into its possession were, as plaintiff is informed and believes and therefore avers, all of which it could obtain possession and all but one or two of said Phinney scales which were then in the hands of users thereof. The purpose of said The Computing Scale Company in so searching for and purchasing and taking possession of said scales was to and it did destroy or secrete the same and thus suppress and keep from this plaintiff and from the courts in which said The Computing Scale Company had brought or might bring suits all knowledge of the fact that the said Smith reissued patent No. 11536 was invalid because of the prior invention and public use of a substantially identical device manufactured by said Phinney under his patent aforesaid.

11. After said The Computing Scale Company had, as aforesaid, obtained possession of, secreted and destroyed substantially all of the scales manufactured under the Phinney patent aforesaid, said The Computing Scale Company (still in pursuance of its design to injure and destroy plaintiff's business) instituted another suit against this plaintiff in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, being Cause No. 30024, in equity, for the alleged infringement by said Toledo Scale Company, this plaintiff, of said Smith reissued patent No. 11536 and of a certain original patent No. 597,300, which said The Computing Scale Company in its bill of complaint in said case claimed to own. The solicitors and counsel for The Computing Scale Company in said suit were not the solicitors who had represented it in said suits in the Eastern District of Pennsylvania or in this court. Plaintiff is informed and believes and therefore avers that said The Computing Scale Company did not inform its said solicitors and counsel in said cause No. 30024 of the facts with reference to the prior use of the light weight skeleton cylinder under the Phinney patent, of which it had full knowledge as hereinabove set forth,

and caused its said solicitors and counsel to prepare and file on its behalf in said suit in said Eastern Division of the Northern District of Illinois a bill of complaint in which it was alleged that one Albert W. Smith, before the 30th day of July, 1897,

"became and was the original, first and sole inventor of cer-
29 tain new and useful improvements and inventions in price scales, fully shown, described and claimed in Letters Patent of the United States hereinafter mentioned, which improvements in price scales were not known or used by others in this country and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale in the United States for more than two years prior to his application for letters patent and which had not been abandoned to the public."

As the officers of said The Computing Scale Company, including O. O. Ozias then Vice-president of said Company, who verified said bill of complaint, then well knew, said statement and each and every part thereof was false in so far as it related to said reissued Letters Patent No. 11536, and said The Computing Scale Company caused said statement to be made in said bill of complaint and said writ to be filed only because of the belief of said The Computing Scale Company that it had so completely and successfully suppressed and secreted the evidence necessary to demonstrate the falsity of said statement as that plaintiff herein as defendant therein could not prove the true facts. Original patent No. 597,300 need not be further mentioned herein for the reason that same was held invalid in said litigation and the bill of complaint of said The Computing Scale Company dismissed as to said patent by order of the Circuit Court of Appeals for the Seventh Circuit, whereby the rights of the parties to said suit were made to depend wholly upon the question as to the validity of said reissued patent No. 11536, which question in turn depended wholly upon the question as to whether any computing scale having a light weight skeleton cylinder had ever been built and placed in usage prior to the issuance of said reissued patent No. 11536.

12. In the answer of this plaintiff as defendant in said suit in said Eastern Division of the Northern District of Illinois it alleged, among other defenses, that prior to the alleged invention of said scale by said Smith that the said inventions and improvements had been patented and described in Letters Patent issued by the United States No. 106,869 granted to William H. Phinney and had been used by him and others. In the said Phinney patent, however, the patentee had neglected to specify that the cylinder should be of light
weight or skeleton construction covered with light material,
30 although, as aforesaid, the scales constructed by said Phinney under said patent were, in fact, of that construction. It was claimed in said suit by counsel for The Computing Scale Company that said Smith reissued patent constituted a valid patent covering a new invention and improvement in scales by reason of the fact that

said Smith was the first person to discover the fact that a light weight cylinder was necessary for an accurate and useful computing scale and that prior to said discovery and the construction of a scale with such a cylinder by said Smith, no one, either Phinney or anyone else, had ever constructed a practicable, useful and accurate computing cylinder scale. Plaintiff is informed and believes and therefore avers that the counsel for The Computing Scale Company or plaintiff in said case were in good faith in making said claim and in introducing in evidence the testimony of a number of witnesses in support thereof, said counsel, as plaintiff is informed and believes and therefore avers, having been kept in ignorance of the true facts by said The Computing Scale Company as aforesaid. Certain of said witnesses, may have testified in good faith by reason of a lack of knowledge upon their part that there had been any use prior to Smith invention and patent of any computing scale having a light weight skeleton construction. Other witnesses, however, and among them certain officers of The Computing Scale Company, plaintiff is informed and believes and therefore avers had full knowledge of the manufacture and use of the Phinney scale with said cylinder of light weight skeleton construction as hereinbefore set forth but notwithstanding such knowledge falsely testified that there had been no such prior use of any such scale.

13. Prior to the beginning and during the taking of testimony in said suit brought by the defendant herein, The Computing Scale Company, against this plaintiff in the United States District Court for the Northern District of Illinois, Eastern Division, plaintiff herein made most diligent efforts to ascertain the state of the prior art with reference to the patents relied upon by said The Computing Scale Company in said suit, including the said Smith reissued patent, and plaintiff spent thousands of dollars in said investigation, both in the searching of records and the investigation of information as to the manufacture of scales by various persons and corporations. Through the records of the Patent Office plaintiff learned of said Phinney patent, which, as aforesaid, called for a
31 cylinder but did not specify a light weight or skeleton cylinder. By reason of the fraudulent activities of the defendant, The Computing Scale Company, herein set forth, plaintiff was not able to and did not, notwithstanding diligent effort upon its part, learn of the manufacture, use or existence of any scales made by said Phinney or under the said Phinney patent, and no information was given to plaintiff or any of its representatives by counsel for the defendant, The Computing Scale Company, or by any person connected with said Company or by any of the counsel for the Federal Scale Company, or said Randall of the evidence and exhibits which had been produced in the suits hereinbefore mentioned theretofore brought by The Computing Scale Company; and plaintiff had no knowledge or information from any source whatsoever of the said two suits brought by said The Computing Scale Company in the Eastern District of Pennsylvania or of the defenses made therein or of the evidence or exhibits therein introduced. Plaintiff is informed

and believes and therefore avers that in pursuance of its fraudulent and malicious design and conspiracy to ruin and destroy plaintiff by asserting an unfounded and fraudulent claim against it, as aforesaid, the defendant, The Computing Scale Company, made some arrangements, the exact details of which are to plaintiff unknown but well known to said defendant, The Computing Scale Company, by which said evidence and exhibits were not made a matter of record and were kept secret so that they did not come to the knowledge of the plaintiff herein.

14. By reason solely of the fraudulent acts and conduct of said The Computing Scale Company as herein set forth, the Toledo Scale Company, plaintiff herein, as defendant in said suit in said Eastern Division of the Northern District of Illinois was unable to and did not obtain any knowledge or information of the true facts with respect to the manufacture and use of the Phinney scales until after the decree of said District Court had been entered sustaining the validity of the alleged patents of the plaintiff, The Computing Scale Company, in said suit, and finding that the plaintiff herein as defendant therein had infringed said patents. Plaintiff herein as defendant in said suit was, by reason of the acts of The Computing Scale Company, plaintiff therein, unable to and did not raise any issue in the evidence as to the prior manufacture and use of scales under said Phinney patent with a cylinder of light weight skeleton construction and was unable and did not offer any
32 evidence contesting the claims of The Computing Scale Company that there never had been any such manufacture and use.

15. As a result solely of said fraudulent practices and conduct upon the part of said The Computing Scale Company and its coconspirators aforesaid it was successful in obtaining a decree from said District Court for the Eastern Division of the Northern District of Illinois against this plaintiff as defendant in said suit sustaining the validity of said two Smith patents and finding this plaintiff to have infringed same. This plaintiff as defendant in said suit duly prosecuted an appeal from the order and decree of said District Court of the United States to the United States Circuit Court of Appeals for the Seventh Judicial Circuit and said appeal was submitted to said court upon the briefs and argument of the counsel for the parties.

16. In the brief for The Computing Scale Company filed by its solicitors in said proceedings on appeal, statements were made of which the following are examples:

"The third class of scales, namely automatic computing scales, never existed until Smith devised the structure set forth and claimed in reissue Patent 11536." (Brief Page 3).

"Examination of the many witnesses produced in this case failed to show that any scales had ever been built by Phinney. * * * Neither the Phinney nor the Babcock patent contains any allusion whatever to the necessity of making the revolving drum of extreme

lightness and subsequent developments demonstrate that neither of them knew that the revolving drum of such a scale must be light, in order to make the difference between failure and success." (Brief page 4.)

"The fallacy of this argument" (that Smith's cylinder differed merely in degree) "is apparent when it is tested by the fact that scales constructed by Smith in accordance with Claims 5 and 6 of the reissue patent were absolutely the first successful automatic computing scales, and there were, therefore, no earlier automatic computing scales which Smith could vary in degree or in which he could make a substitution of materials." (Brief page 8.)

"According to the memory of many witnesses, both for the complainant and the defendant, no automatic computing scale
33 with an indicating drum was put on the market before the Smith scale, lawfully manufactured in connection with the Smith reissue patent in suit." (Brief p. 11.)

"Having made this discovery, he (Smith), proceeded further and devised and disclosed means for relieving the mechanism of a computing scale of that excessive weight which had prevented such scales from being a success." (Brief Page- 12, 13.)

"It has been contended in argument by defendant that whenever the occasion arose for making a light drum it was merely a matter of mechanical skill to provide such a light cylinder. It is to be borne in mind, however, that this occasion never did arise until Smith discovered that the failure of prior automatic computing scales was due to the excessive weight of the mechanism. It required his discovery to cause this occasion to arise. For a quarter of a century prior to Smith's invention the occasion had arisen for constructing automatic computing scales and inventors had tried to construct them but they did not know wherein the difficulty consisted and it remained for Smith to discover the source of that difficulty and to remedy it." (Page 13.)

"Now, whatever you choose to call it, the ultimate difference between the scales of the Phinney and Babcock patents on the one hand and the scale of the Smith patent on the other hand, is that the former were absolute failures and the latter was a marvellous success." (Page 39.)

"The record in this case establishes—

1. That no automatic computing scale existed prior to the date of Smith's invention.

2. * * *

3. That numerous unsuccessful attempts had been made to meet this demand including the efforts of the patentee Phinney and Babcock and the unsuccessful effort of the veteran scale maker Culmer to construct a scale according to the instruction of the Phinney patent. * * * (Brief page 47.)

Plaintiff is informed and believes and therefore avers that counsel for The Computing Scale Company made such statements in

their brief in good faith, believing them to be true in the absence of evidence to the contrary in the record, but plaintiff says that such lack of evidence existed only because this plaintiff as
34 defendant in said District Court was deprived by the fraud of the plaintiff therein, The Computing Scale Company, of the opportunity and evidence necessary to prove the true facts as hereinabove set forth.

(17) Notwithstanding the true facts with respect to the earlier manufacture by Phinney of a scale with a light weight cylinder or indicating drum and the successful use thereof as hereinbefore set forth, the solicitors for this plaintiff as appellant upon said appeal in said proceedings in the Circuit Court of Appeals for the Seventh Circuit were, by reason of the fraudulent conduct of The Computing Scale Company as hereinbefore set forth, unable to dispute the claims made by said The Computing Scale Company as hereinbefore set forth, and as the solicitors for this plaintiff as such appellant had no knowledge of the manufacture and use of said light weight cylinder or indicating drum by said Phinney, they stated among other things in their brief for this plaintiff as appellant, referring to the Phinney patent and another patent,

"Inasmuch, however, as these patents do not specify the particular materials employed by Smith, it may be conceded for the purposes of the argument that the materials specified in the Smith patent are different from those employed by the earlier patentees, and that the indicator drum of his scale is correspondingly lighter."

Said admissions, while entirely justified by the state of the record and of the information which this plaintiff's counsel by most diligent effort had been able to obtain, was contrary to the real facts of which said The Computing Scale Company had knowledge and which it had suppressed and kept from this plaintiff as aforesaid. In the petition for rehearing which was filed by counsel for this plaintiff as appellant in said proceeding in said Circuit Court of Appeals for the Seventh Circuit, it was stated among other things that "the record contains no proof that anyone ever constructed a scale in accordance with either the Phinney or the Babcock patent * * *." This statement was correct and the record in fact contained no such evidence, but such evidence was absent therefrom only and solely because of the fact that said The Computing Scale Company had obtained possession of and otherwise suppressed said evidence as hereinbefore set forth.

(18) Upon considering the record upon said appeal said Circuit Court of Appeals filed an opinion sustaining the validity of said reissued patent No. 11536. Said patent was sustained by said
35 Circuit Court of Appeals upon the sole ground that as disclosed by the record before them the light weight cylinder was the invention of said Smith, and that until he had discovered the necessity for a light weight cylinder no one had ever made or used a successful computing cylinder scale. In the course of the

opinion of said Circuit Court of Appeals they use the following expressions:

"In this record the greatest thing is the fact that Smith put in the hands of the world's vendors of commodities the first useable automatic computing scale. Long before Smith's time, and the length of the interval is a fact of considerable weight, the paper art (Phinney's patent No. 106,869 in 1870 and Babcock's No. 421,805 in 1890) had professed to teach practical scale make-s how to build automatic computing scales. But when this disclosure was given material bodies, failure was the result."

"In the prior art were combinations of indicator drums and weighing mechanisms. But the cause of their failure might lie at any one of many points. It remained for Smith to discover that the most essential thing in reorganizing the old elements was to make the drum so light that its interference with the weighing operation would be eliminated."

"Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course the lessening of weight is a matter of degree; but it is not necessarily merely a matter of degree. If the change converts failure into success, something more than a matter of degree is involved."

"The quoted part of the applicant's original description shows that the idea of the light drum, the purpose to be accomplished by it, and the means by which it was to be produced, constituted the principal part of his invention."

(19) The conclusions drawn by said United States Circuit Court of Appeals for the Seventh Circuit, and upon which it based its decision that said Smith patent No. 11536 was valid, were based, of course, solely upon the record which was then before that court, which record, by reason of the fraudulent conduct of The Computing Scale Company and its co-conspirators aforesaid was, as hereinbefore shown, barren of any evidence showing the manufacture under the Phinney patent and the sale and long continued
36 successful use of computing scales having a light weight cylinder or indicating drum substantially identical with that claimed by said The Computing Scale Company to have been invented by said Smith. The true facts with respect to the prior manufacture and successful use of such a computing scale with such a light weight cylinder were the exact opposite, as hereinbefore set forth, of those upon which the court based its opinion sustaining said Smith patent, and the act of said The Cmputing Scale Company in urging upon said court the validity of said Smith patent upon such ground, and in seeking and obtaining from said court said opinion based on said claim, constituted a fraud and imposition upon said United States Circuit Court of Appeals for the Seventh Circuit, as well as upon this plaintiff.

20. In the said opinion of said United States Circuit Court of Appeals it was further held that said Smith patent No. 579,300 was invalid, and the bill of complaint of said The Computing Scale

Company, so far as said patent was concerned, was ordered dismissed. Said court further found that although said Smith reissued patent No. 11536 was valid The Computing Scale Company, as plaintiff in said suit, had failed to prove title thereto in itself. Said Court of Appeals therefore reversed the decree of the District Court of the United States in said cause in favor of The Computing Scale Company and remanded said cause to said District Court with the direction to dismiss the bill on the second patent No. 579,300 and to permit complainant to introduce proof of title to the first patent reissued No. 11536."

21. In the year 1911 after the filing of said suit against this plaintiff by said The Computing Scale Company in the United States District Court for the Eastern Division of the Northern District of Illinois said The Computing Scale Company instituted a suit against the Standard Computing Scale Company in the District Court of the United States for the Eastern District of Wisconsin. In said suit said The Computing Scale Company asserted an infringement by the defendant therein of said Smith reissued patent No. 11536 and original Patent No. 579,300. An answer was filed in said suit by the Standard Computing Scale Company in which it alleged as a defense the Phinney patent and later by amendment to said answer the prior manufacture and use of scales embodying same, and said suit was never brought to trial by said The Computing Scale Company and was ultimately caused or permitted to be dismissed by said company notwithstanding it had ob-
37 tained, prior to such dismissal, the decree hereinbefore mentioned from the United States Circuit Court of Appeals for the Seventh Circuit sustaining the validity of said Smith reissued patent No. 11536 in said suit brought by The Computing Scale Company against this plaintiff.

22. During the pendency of this plaintiff's appeal in said United States Circuit Court of Appeals for the Seventh Circuit, and shortly before the decision of said court, one of the solicitors for this plaintiff, the appellant in said court, was informed by one of the counsel for said Standard Computing Scale Company that he, the said counsel for said Standard Company, had learned accidentally long after said Standard Company had filed its answer that there had been some scales manufactured under the Phinney patent, and that said scales had very light computing drums whose shells or cylinders were formed of paper. Thereupon the counsel for this plaintiff as appellant in said proceedings made a diligent investigation and search with respect to said matter, and found that William H. Phinney, the patentee, had then been dead for some ten years, but that his son, Thomas Z. Phinney, (who had in the meantime removed to another city from that in which said William H. Phinney had lived and manufactured said scales) had been familiar with his father's invention and patent and with the scales manufactured under them, and said counsel obtained an affidavit from said Thomas Z. Phinney. Said counsel learned from said Phinney of the fact that he and a number of other witnesses familiar with the facts relating to his

father's old scales had been examined concerning them on behalf of the defendant in some suit which he believed to have been pending at Philadelphia, and learned from said Phinney the name of the counsel for the defendant in said Philadelphia suit, and upon further investigation said counsel found the facts relative to the bringing of the suit against the said Federal Scale Company and The Computing Scale Company, the taking of testimony therein, and that the prosecution of said suit had afterwards been abandoned.

Said counsel obtained a number of affidavits with respect to the manufacture by said Phinney of successful computing scales of the types and embodying the light weight cylinders aforesaid and of the use of said cylinders by a number of storekeepers and others, and also obtained an affidavit from the counsel for the Standard Computing Scale Company in which said counsel showed that his
38 discovery of the fact that said Phinney had manufactured said computing scales with said light weight cylinders was accidental; and therefore counsel for this plaintiff as appellant in said cause moved the Circuit Court of Appeals for leave to dismiss its appeal as to the reissued patent in suit in order that the District Court might entertain an application to re-open this cause for newly discovered evidence. This motion was denied by said Circuit Court of Appeals.

23. After the Circuit Court of Appeals for the Seventh Circuit had handed down its opinion as hereinbefore set forth this plaintiff as appellant in said proceeding in said court filed its motion supported by affidavits that said court should include in its mandate to the District Court permission to "entertain and consider, and if so advised, to grant an application of the defendant for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissued letters patent in suit in said cause and to rehear said cause on such additional proofs." Said motion was denied by said Circuit Court of Appeals. This plaintiff as appellant in said proceeding did not request said modification of said mandate or any other relief from said Circuit Court of Appeals on the ground that The Computing Scale Company had fraudulently deprived the plaintiff of the opportunity to present its defense by purchasing and secreting the Phinney scales for the reason that it had not then discovered the fraudulent acts and suppression of evidence by said The Computing Scale Company in said respects hereinbefore set forth.

24. Upon said cause coming on for hearing in the District Court of the United States for the Eastern Division of the Northern District of Illinois in pursuance of said mandate from said United States Circuit Court of Appeals said District Court heard additional evidence with respect to the title of said The Computing Scale Company to said reissued patent No. 11536 and upon such hearing found that proof of such title had been made by said The Computing Scale Company and thereupon referred said cause to a Master to hear

and determine and report to the court the amount which said The Computing Scale Company was entitled to recover from this plaintiff by reason of the infringement found to have been committed by this plaintiff of said reissued patent No. 11536. Said Master heard evidence upon said subject and made findings of fact and con-
39 clusions of law and reported to the Court that said The Computing Scale Company was entitled to receive from this plaintiff $404,101.97, being, as said Master found, the profits made by this plaintiff on the manufacture and sale of said scale theretofore held, as hereinbefore set forth, to be an infringing scale. Thereafter on March 5, 1919, the United States District Court for the Eastern Division of the Northern District of Illinois entered a decree upon said Master's report, giving said The Computing Scale Company a judgment against The Toledo Scale Company, plaintiff herein, in the amount of $420,883.44. Said judgment was affirmed on appeal by said United States Circuit Court of Appeals for the Seventh Circuit in an opinion filed October 4, 1921.

(25) In said proceedings before said Master this plaintiff as defendant in said cause, offered evidence of the prior manufacture sale and use of said light weight cylinder in said computing scale so manufactured by said Phinney, but said Master and the District Court and said United States Circuit Court of Appeals each and all declined to consider said evidence, either as bearing upon the validity of said reissued patent No. 11536 or as affecting the amount recoverable by said The Computing Scale Company. Said Master ruled that he was bound by the opinion of said Circuit Court of Appeals to the effect that the Smith scale under said reissued Patent No. 11536 made upon the first appeal, was the first successful automatic computing scale, and that Smith was the inventor and discovered of the light weight cylinder for use therein, and the District Court affirmed the Master without opinion; and the Circuit Court of Appeals upon this point in their second opinion said:

"Respecting the insistence that, on the proofs offered to the Master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1915 petition to reopen the case on the merits, should reverse our precedent decree upholding the validity of the patent and should reverse the District Court's decree of 1914 and 1919 with the direction to dismiss the bill, we say:

"A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leaves us to reject the demand.

40 "B. If it be regarded as a petition in the nature of a bill of review appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review on the same grounds inclines us to stay our hands."

This plaintiff as appellant in said proceeding did not present to said Circuit Court of Appeals, either in the record taken before the Master or before said District Court or otherwise, any evidence with respect to the fraudulent suppression of evidence by said The Computing Scale Company for the reason that plaintiff had no knowledge that said The Computing Scale Company had purchased and secreted or destroyed any of said Phinney scales until on or about the 20th day of December, 1921, and long after the second decision of said case by said Circuit Court of Appeals. This plaintiff never has had its day in court to present to any court on its merits the true facts with respect to the manufacture, sale and successful use of computing scales under the Phinney patent embodying a cylinder or indicating drum substantially identical with that described in and covered by said Smith reissued patent No. 11536 and has had no hearing or opportunity to be heard prior to this time in any court with respect to the frauds practiced upon it and upon said District Court for the Eastern Division of the Northern District of Illinois and said United States Circuit Court of Appeals for the Seventh Circuit.

26. After the second decision of said Circuit Court of Appeals for the Seventh Circuit had been rendered as aforesaid this plaintiff duly applied to the United States Supreme Court for a writ of certiorari, which application was denied by said court on the 9th day of January, 1922.

(27) After the entry of said judgment against plaintiff in said United States District Court for the Eastern Division of the Northern District of Illinois in the sum of $420,883.44, with interest from March 5, 1919, as aforesaid, this plaintiff as defendant in said suit gave its supersedeas bond in favor of said The Computing Scale Company for the purpose of staying execution of said judgment. Said supersedeas bond is in the amount of $450,000.00 and was duly executed by this plaintiff as principal and by the defendant herein, Fidelity & Deposit Company of Maryland, as surety, and was duly filed and approved, and is now in full force and effect.

41 After the second opinion of said United States Circuit Court of Appeals for the Seventh Circuit had been filed as hereinbefore set forth this plaintiff as appellant in said court moved the court for a stay of mandate in said cause, and thereupon said court ordered that this plaintiff as appellant file an additional bond in the sum of $50,000.00, and that the mandate in said cause be stayed until the further order of said court. Thereupon on November 2, 1921, in pursuance of said order this plaintiff as principal and the defendant herein, Fidelity & Deposit Company of Maryland, as surety, duly executed the bond in the sum of $50,000 in favor of said The Computing Scale Company, as further security for the payment to said The Computing Scale Company of the amount of said judgment against this plaintiff, together with interest thereon to the date of payment, and said bond was duly filed and approved and is now in full force and effect.

(28) By the terms of said bonds for $450,000.00 and $50,000.00 espectively, the defendant herein, Fidelity & Deposit Company of laryland, is unconditionally obligated to pay to the defendant erein, The Computing Scale Company, the amount of the judgment obtained by said The Computing Scale Company against this laintiff in said suit in said District Court for the Eastern Division f the Northern District of Illinois as soon as the mandate from said nited States Circuit Court of Appeals to said District Court affirming the judgment of said District Court shall be issued and said mandate will now be issued at once or in the very immediate future and aid defendant, Fidelity & Deposit Company will thereupon be called pon to and will, if not restrained by this court, pay to said The omputing Scale Company the amount of said judgment and interst fraudulently obtained by said The Computing Scale Company gainst this plaintiff as hereinbefore set forth.

(29) In order to obtain the execution of said bond for $450,000.00 y said Fidelity & Deposit Company as surety, it was necessary for his plaintiff to execute its checks, have same duly certified and deiver same to said Fidelity & Deposit Company for the sum of $455,000.00. Said checks were drawn upon and certified by the defendnt, The First Nation- Bank of Toledo, Ohio, for $50,000.00; the lefendant the Second National Bank of Toledo, Ohio, for $75,000.00; he defendant Northern National Bank of Toledo, Ohio, for $55,000.00; the National Bank of Commerce, the predecessor of the defendant The Commerce-Guardian Trust and Savings Bank, for $75,000.00; and The Guardian Savings Bank and Trust Com-
42 pany, Cleveland, Ohio, for $200,000.00. Said defendant Fidelity & Deposit Company deposited said certified checks to its account in said banks upon which they were drawn respectively nd received from said banks unconditional certificates of deposit payable on demand in favor of said defendant, Fidelity & Deposit Company, and now holds, as security against loss by reason of its liability on said bond for $450,000.00, unconditional certificates of deposit payable to its order on demand as aforesaid issued by the defendant, First National Bank of Toledo, Ohio, for $50,000.00; by the defendant, Second National Bank of Toledo, Ohio, for $75,000.00; by the defendant, Northern National Bank of Toledo, Ohio, for $55,000.00; by the defendant, The Commerce-Guardian Trust and Savings Bank for $75,000.00; and the defendant, The Guardian Trust and Savings Bank Company of Cleveland, Ohio, for $200,000.00.

(30) Since said certificates of deposit were issued and delivered to Fidelity & Deposit Company of Maryland as aforesaid, interest has accumulated thereon amounting in the aggregate to an amount in excess of $25,000.00, and at the time said Fidelity & Deposit Company executed said second bond in the amount of $50,000.00 it was agreed between plaintiff and said company that the interest accrued and to accrue on said certificates of deposit respectively should stand as security for said Fidelity & Deposit Company of Maryland against loss by reason of its execution of said bond.

(31) The amount of said judgment against plaintiff hereinbefor mentioned with interest to date is in excess of $490,000.00 and if th defendant The Computing Scale Company is permitted to colle the amount thereof from the defendant, Fidelity & Deposit Com pany of Maryland, as the surety upon said bonds said Fidelity Deposit Company of Maryland would at once be entitled to presen for payment each and all of said certificates of deposit and to colle the principal and interest due thereon and apply the same in satis faction of the amount paid by it in payment of said judgment an said certificates would, in such event, be at once presented to sai banks respectively and demand made for the payment thereof forth with by said defendant, Fidelity & Deposit Company, and in suc event said several banks respectively, if not restrained herein, woul be obliged to and would pay said Fidelity & Deposit Company th amount due on said several certificates of deposit respectively, an plaintiff would be compelled to pay any balance remainin
43 due to said Fidelity & Deposit Company of Maryland, wit the ultimate result that this plaintiff would lose an amount i excess of $490,000.00, all by reason of the fraudulent acts and con duct of the defendant The Computing Scale Company in pursuanc of said conspiracy as hereinbefore set forth.

(32) The loss which would result to plaintiff if said defendan The Computing Scale Company is not enjoined and restrained fro enforcing against this plaintiff and its property and against defend ant Fidelity & Deposit Company as surety on said bonds, the whol or any part of said judgment will be irreparable, not only by reaso of the fact that this plaintiff would have no remedy at law for th recovery thereof, but by reason of the further fact that the paymen thereof by this plaintiff would greatly cripple its business operation and curtail its business and would expose plaintiff to grave dange of complete ruin, and the levy of execution upon said judgment o its property would greatly injure its credit. Plaintiff has exhauste every remedy which it has in or in connection with said suit i which said judgment was obtained against it by said The Computin Scale Company and has no remedy, except in equity.

(33) Plaintiff further says that by reason of the facts hereinbe fore related there is imminent and grave danger that said defendan The Computing Scale Company will take steps to enforce its sai judgment against this plaintiff in the immediate future, either b way of levy upon property which this plaintiff has in the Eastern Di vision of the Northern District of Illinois, aggregating many thou sand dollars in value, or by enforcing payment of said bonds by sai the Fidelity & Deposit Company of Maryland, and that it is neces sary in order to avoid immediate and irreparable injury, loss an damage, which will result to plaintiff before notice can be serve and hearing had, that a restraining order issue herein without notice as hereinbefore prayed for.

Plaintiff waives answer under oath.

Wherefore plaintiff prays that a temporary restraining order may issue herein without notice, enjoining and restraining the defendant The Computing Scale Company, its officers, agents, solicitors, attorneys and representatives from enforcing or attempting to enforce, in any manner whatsoever, the judgment entered by the District Court of the United States for the Eastern Division of the Northern District of Illinois in the cause in said court entitled The Computing
44 Scale Company, Complainant vs. The Toledo Computing Scale Company, defendant, No. 30024 in equity; and enjoining and restraining said The Computing Scale Company from enforcing or attempting in any manner to enforce payment by said Fidelity & Deposit Company of Maryland upon said bonds in the amount of $450,000.00 and $50,000.00 respectively, executed by plaintiff as principal and Fidelity & Deposit Company of Maryland as surety, and from in any manner asserting any right or claim based upon or under the said judgment or the decrees of the United States Circuit Court of Appeals for the Seventh Circuit affirming the same, and that the defendant Fidelity & Deposit Company of Maryland may be enjoined and restrained from making any payment to said The Computing Scale Company or to any one upon its behalf upon or under said bonds or either of them, and that said defendant Fidelity & Deposit Company may be enjoined and restrained from cashing said certificates of deposit and each of them, and from withdrawing from the defendant banks any of the funds on deposit with them respectively under the certificates of deposit held by said Fidelity & Deposit Company as its security against liability upon said bonds, and that the defendants the Second National Bank of Toledo, the First National Bank of Toledo, the Northern National Bank of Toledo, The Commerce-Guardian Trust and Savings Bank of Toledo, and The Guardian Trust and Savings Bank Company of Cleveland, Ohio, and each and all of them be enjoined and restrained from paying to or on the order of Fidelity & Deposit Company of Maryland any of the certificates of deposit issued by them respectively for certified checks of plaintiff.

Plaintiff further prays that in due course a preliminary injunction may issue herein, having the same scope and effect as the temporary restraining order hereinbefore prayed for and to remain in effect pending the further order of the court herein.

Plaintiff further prays that upon final hearing herein the defendant The Computing Scale Company may be perpetually enjoined and restrained from enforcing or attempting to enforce as against this plaintiff, its successors and assigns, any liability or claim of any kind, based upon or arising under or growing out of said judgment obtained by said The Computing Scale Company in said suit in the Eastern Division of the Northern District of Illinois, and any decrees of the United States Circuit Court of Appeals for the Seventh
45 Circuit upon any appeals in said cause either by levy or execution or in any other manner and that said The Computing Scale Company may be perpetually enjoined and restrained from enforcing or attempting to enforce or asserting against this plaintiff and said Fidelity & Deposit Company of Maryland, its successors and as-

signs, any liability or claim of any kind or character whatsoever, based upon or growing out of said bonds in the amount of $450,000.00 and $50,000.00 respectively, executed by plaintiff as principal and Fidelity & Deposit Company of Maryland, defendant herein, as surety, in favor of said The Computing Scale Company, and that said The Computing Scale Company may be perpetually enjoined and restrained from seeking or claiming any kind of advantage or benefit of whatsoever nature because of or based upon the entry of each, all or any of the judgments, orders or decrees entered in said suit, and in any appeal therein.

Plaintiff further prays that it may be relieved from all liability to said The Computing Scale Company, its successors and assigns, by reason of the said judgment and decree of said United States District Court for the Eastern Division of the Northern District of Illinois, and of the orders and decrees upon any and all appeals therein, that said bonds in the amount of $450,000.00 and $50,000.00 respectively, in favor of said The Computing Scale Company may be found and held to have been obtained by said The Computing Scale Company fraudulently, and that same may be cancelled, and that plaintiff and Fidelity & Deposit Company of Maryland may be relieved from any and all further liability thereon.

Plaintiff further prays that Fidelity & Deposit Company may be ordered and directed to turn over to plaintiff, either by way of assignments of said certificates of deposit or otherwise, all moneys on deposit with each of the defendant banks, for which said Fidelity & Deposit Company of Maryland hold certificates of deposit as security against liability on the said bonds or either of them.

Plaintiff has obtained and files herewith, attached hereto, marked Exhibits A to —, affidavits of sundry persons bearing upon the fraud of said defendant The Computing Scale Company, and makes reference thereto, and prays that same may be received in evidence as a part of this bill of complaint upon the hearing of its motions for a temporary restraining injunction.

46 Plaintiff further prays for any and all other relief to which it may be entitled.

RATHBUN FULLER,
BROWN, GEDDES, SCHMETTAU & WILLIAMS,
TRACY, CHAPMAN & WELLES,
Solicitors for Plaintiff.

RATHBUN FULLER,
F. L. GEDDES,
GEO. D. WELLES,
Of Counsel,

STATE OF OHIO,
Lucas County, ss:

Henry Theobald, being first duly sworn upon his oath, says that he is President of the plaintiff the Toledo Scale Company, that he is familiar with the facts stated in the foregoing bill of complaint, and

that the facts therein set forth are true, except in so far as same are alleged to be made on information and belief, and as to such facts he is informed and believes that they are true.

HENRY THEOBALD.

Sworn to before me and subscribed in my presence this 9th day of January, 1922.

[SEAL.]

FRANK E. MILLER,
Notary Public, Lucas County, Ohio.

47 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, THE FIDELITY & DEPOSIT COMpany of Maryland, The First National Bank of Toledo, Ohio, The Second National Bank of Toledo, Ohio, The Northern National Bank of Toledo, Ohio, The Commerce-Guard- — -pany, and The Guardian Savings and Trust Company, Defendants.

Amendment to the Bill of Complaint.

Now comes the Toledo Scale Company, plaintiff in the above entitled action and files this its amendment to the bill of complaint heretofore filed herein, and makes The United States Fidelity & Guaranty Company a party defendant herein, and says,

(1) That said United States Fidelity & Guaranty Company is a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and is a citizen and resident of said state.

(2) That in lieu of paragraphs 27, 28, 29, 31, 32, and 33 of its said bill of complaint it avers:

(27) After the entry of said judgment against plaintiff, in said United States District Court for the Eastern Division of the Northern District of Illinois, in the sum of Four Hundred Twenty Thousand Eight Hundred Eighty Three and 44/100 Dollars ($420,883.44) with interest from March 3, 1919, as aforesaid, this plaintiff as defendant in said suit, gave its supersedeas bond in favor of said The Computing Scale Company, for the purpose of staying execution of said judgment. Said supersedeas bond is in the amount of
48 $450,000.00 and was duly executed by this plaintiff as principal and by the defendants herein, Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company, as sureties, and was duly filed and approved and is now in full force and effect.

After the second opinion of said United States Circuit Court of Appeals for the Seventh Circuit had been filed, as hereinbefore set

forth, this plaintiff, as appellant in said court, moved the court for a stay of mandate in said cause, and thereupon said court ordered that this plaintiff, as appellant, file an additional bond in the sum of $50,000.00, and that the mandate in said cause be stayed until the further order of said court. Thereupon, on November 2, 1921, in pursuance of said order, this plaintiff, as principal and the defendant herein, Fidelity & Deposit Company of Maryland as surety, duly executed the bond in the sum of $50,000.00 in favor of said The Computing Scale Company, as further security for the payment to said The Computing Scale Company of the amount of said judgment against this plaintiff, together with interest thereon to the date of payment, and said bond was duly filed and approved and is now in full force and effect.

(28) By the terms of said bond for $450,000.00, the defendants herein, Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company are, and by the terms of said bond for $50,000.00 the defendant herein, Fidelity & Deposit Company of Maryland is, unconditionally obligated to pay to the defendant herein, The Computing Scale Company, the amount of the judgment obtained by said The Computing Scale Company against this plaintiff in said suit in said District Court for the Eastern Division of the Northern District of Illinois, as soon as the mandate from said United States Circuit Court of Appeals to said District Court, affirming the judgment of said District Court, shall be issued, and said mandate will now be issued at once or in the very immediate future, and said defendants, Fidelity & Deposit Company and the United States Fidelity & Guaranty Company will thereupon be called upon to and will, if not restrained by this court, pay to said The Computing Scale Company, the amount of said judgment and interest fraudulently obtained by said The Computing Scale Company against this plaintiff, as hereinbefore set forth.

49 (29) In order to obtain the execution of said bond for $450,000.00 by said Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company, as sureties, it was necessary for this plaintiff to execute its checks, have the same duly certified and delivered same to said Fidelity & Deposit Company for the sum of $455,000.00. Said checks were drawn upon and certified by the defendant, the First National Bank of Toledo, Ohio for $50,000.00, the defendant, the Second National Bank of Toledo, Ohio for $75,000.00, the defendant, Northern National Bank of Toledo, Ohio for $55,000.00, the National Bank of Commerce, the predecessor of the defendant The Commerce-Guardian Trust and Savings Bank, for $75,000.00 and the defendant, The Guardian Trust & Savings Bank Company, Cleveland, Ohio for $200,000.00. Said defendant, Fidelity & Deposit Company deposited said certified checks to its account in said banks upon which they were drawn respectively, and received from said banks unconditional certificates of deposit, payable on demand, in favor of said defendant, Fidelity & Deposit Company, and now holds, as security for itself and said defendant United States Fidelity & Guaranty Company against loss

by reason of its liability on said bond for $450,000.00, unconditional certificates of deposit, payable to its order on demand, as aforesaid, issued by the defendant, First National Bank of Toledo, Ohio for $50,000.00, by the defendant, Second National Bank of Toledo, Ohio for $75,000.00, by the defendant, Northern National Bank of Toledo, Ohio for $55,000.00, by the defendant, The Commerce-Guardian Trust & Savings Bank for $75,000.00 and the defendant The Guardian Trust and Savings Bank Company of Cleveland, Ohio for $200,000.00.

(31) The amount of said judgment against said plaintiff hereinbefore mentioned, with interest to date, is in excess of $490,000.00, and if the defendant, The Computing Scale Company is permitted to collect the amount thereof from the defendants, Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company as sureties upon said bond, said Fidelity & Deposit Company of Maryland will at once be entitled to present for payment each and all of said certificates of deposit and to collect the principal and interest due thereon and apply the same in satisfaction of the amount paid by it in payment of said judgment, and said certificates would, in such event, be at once presented to said banks respectively, and demand made for the payment thereof forthwith by said defendant, Fidelity & Deposit Company, and in such event, said several banks respectively, if not restrained herein, would be obliged to and would pay to said Fidelity & Deposit Company the amount due on said several certificates of deposit respectively, and the plaintiff would be compelled to pay any balance remaining due to said Fidelity & Deposit Company of Maryland, with the ultimate result that this plaintiff would lose an amount in excess of $490,000.00, all by reason of the fraudulent acts and conduct of the defendant, The Computing Scale Company, in pursuance of said conspiracy, as hereinbefore set forth.

(32) The loss which would result to plaintiff if said defendant, The Computing Scale Company is not enjoined and restrained from enforcing against this plaintiff and its property and against said defendants, Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company as sureties on said bond, the whole or any part of said judgment will be irreparable, not only by reason of the fact that this plaintiff would have no remedy at law for the recovery thereof, but by reason of the further fact that the payment by this plaintiff would greatly cripple its business operations and curtail its business and would expose plaintiff to grave danger of complete ruin and the levy of execution upon said judgment on its property would greatly injure its credit. Plaintiff has exhausted every remedy which it has in, or in connection with said suit in which said judgment was obtained against it by said The Computing Scale Company, and has no remedy, except in equity.

(33) Plaintiff further says that by reason of the facts hereinbefore related, there is eminent and grave danger that said defendant, The Computing Scale Company will take steps to enforce its

said judgments against this plaintiff in the immediate future, either by way of levy upon property which this plaintiff has in the Eastern Division of the Northern District of Illinois, aggregating many thousand dollars in value, or by enforcing payment of said bonds by said Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company, and that it is necessary in order to avoid immediate and irreparable injury, loss and damage, which will result to plaintiff before notice can be served and hearing had, that a restraining order issue herein without notice as hereinafter prayed for.

Plaintiff waives answer under oath.

51 Wherefore, Plaintiff prays as in its said bill of complaint, and further prays that a temporary restraining order may issue herein without notice enjoining and restraining said The Computing Scale Company, defendant herein, from enforcing or attempting in any manner to enforce payment by said United States Fidelity & Guaranty Company upon said bond in the amount of $450,000.00 executed by plaintiff as principal and Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company as sureties, and that the defendant United States Fidelity & Guaranty Company may be enjoined and restrained from making any payment to said The Computing Scale Company, or any one upon its behalf upon or under said bond.

Plaintiff further prays that in due course a preliminary injunction may issue herein having the same scope and effect as a temporary restraining order hereinbefore prayed for, and to remain in effect pending further order of the court herein and upon final hearing herein said preliminary injunction may by order of the court be made perpetual.

RATHBUN FULLER,
F. L. GEDDES,
GEO. D. WELLES,
Solicitors for Plaintiff.

RATHBUN FULLER,
BROWN, GEDDES, SCHMETTAU & WILLIAMS,
TRACY, CHAPMAN & WELLES,
Of Counsel.

STATE OF OHIO,
Lucas County, ss:

Henry Theobold being first duly sworn upon his oath says that he is President of the plaintiff the Toledo Scale Company, that he is familiar with the facts stated in the foregoing amendment to the bill of complaint and that the facts herein set forth are true.

HENRY THEOBOLD.

Sworn to before me and subscribed in my presence this 11th day of January, 1922.

SEAVEY E. C. MOOR,
Notary Public, Lucas County, Ohio.

52 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Second Amendment to Bill of Complaint.

Now comes the Toledo Scale Company, plaintiff in the above entitled action, and files this its second amendment to the bill of complaint heretofore filed herein, and amends said bill of complaint as follows:

First. Plaintiff makes The Summit Trust Company a party defendant herein. Said defendant, The Summit Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio and is a citizen and resident of said State and of the Western Division of the Northern Judicial District thereof, having its principal office and place of business in the City of Toledo, Lucas County, in said Northern District of said State.

Second. Plaintiff adds to the bill of complaint as filed, immediately before the prayer, a paragraph numbered "34", as follows:

34. Plaintiff further says that in order to give its certified checks drawn upon the defendant banks in the aggregate amount of Four Hundred Fifty-Five Thousand Dollars ($455,000.00), as hereinbefore set forth, it was necessary for plaintiff to, and plaintiff did, borrow sums aggregating said amount of Four Hundred Fifty-
53 Five Thousand Dollars ($455,000.00) from said banks, and said sums were borrowed from each bank in the exact amount of the certified check to be drawn upon each bank respectively, to-wit, in the following amounts:

Second National Bank of Toledo	$75,000
First National Bank of Toledo	50,000
Northern National Bank of Toledo	55,000
National Bank of Commerce (now The Commerce-Guardian Trust and Savings Bank)	75,000
The Guardian Savings and Trust Company	200,000

In order to borrow said sums from said banks, it was necessary for plaintiff to, and plaintiff did, enter into an agreement, in which agreement was set forth the fact that in said suit in the Eastern Division of the Northern District of Illinois the Master had found that the plaintiff herein was indebted to the defendant herein, The

Computing Scale Company, in the amount of Four Hundred Four Thousand One Hundred One and 97/100 Dollars ($404,101.97), and that a decree was about to be entered in said court for said amount with interest and costs; that plaintiff herein desired to appeal said cause to the United States Circuit Court of Appeals for the Seventh Circuit, and that the Fidelity and Deposit Company of Maryland had agreed to act as surety on the appeal bond to be given by plaintiff, upon condition that it be fully indemnified. Said agreement further sets forth that said Fidelity and Deposit Company of Maryland was to be indemnified by giving it checks which should in the aggregate equal the penal amount of such appeal bond, and that such checks should then be deposited in the banks against which the same were drawn, and that said Fidelity and Deposit Company of Maryland should then receive unconditional certificates of deposit from said banks in the amounts of the several checks drawn against them respectively, payable unconditionally to Fidelity and Deposit Company of Maryland upon demand, bearing interest at the rate of three (3%) per cent per annum; that said Fidelity and Deposit Company should allow the money represented by such certificates of deposit to remain with such banks until said decree is reversed, paid or settled and its liability on said appeal bond released.

It was further set forth in said agreement that the plaintiff, Toledo Scale Company, at the date of said agreement, to-wit, February 21, 1919, had loans outstanding from said defendant Toledo
54 banks aggregating Three Hundred Ninety-Five Thousand Dollars ($395,000.00) and that it must continue such loans either in their then amounts or in greater or less amounts, said loans held by said Toledo banks then being in the following amounts respectively:

Second National Bank	$150,000
First National Bank	100,000
Northern National Bank	95,000
National Bank of Commerce	50,000

It was further set forth in said agreement that all of said indebtedness, aggregating Three Hundred Ninety-Five Thousand Dollars ($395,000.00), was evidenced by promissory notes of the Toledo Scale Company to said banks respectively, and that the additional amounts to be loaned, aggregating Four Hundred Fifty-Five Thousand Dollars ($450,000.00) should be likewise evidenced by promissory notes, and that all of such notes should be secured by collateral as provided in said agreement. The collateral security provided for in said agreement for said notes was the following:

Bills Receivable (Customers' notes due Scale Company..	$650,000
United States Liberty Loan Bonds	48,500
Canadian Victory Loan Bonds	1,500
Stock of the Morris Plan Bank of Toledo (par value)	5,000
Total	$705,000

It was further provided in said agreement that as further collateral security for such loans the Toledo Scale Company would deposit with The Summit Trust Company, which was by said agreement named as the Trustee to hold said collateral as provided in said agreement, Five Thousand Dollars ($5,000.00) par value of United States Liberty Loan Bonds on the first day of each month, or in lieu thereof Five Thousand Dollars ($5,000.00) in cash, and that as further collateral security for said bonds the Toledo Scale Company would assign, and did thereby assign, to said Trustee all of its interest in and to said certificates of deposit which were to be issued by the several banks to Fidelity and Deposit Company of Maryland, as provided in said agreement, which might be in excess of the sum eventually required to satisfy said decree or any modification or settlement thereof, said excess, if any, to be applied to the reduction of said loans pro rata.

55 The amount of the indebtedness of plaintiff to said several banks, secured by the collateral provided for in said agreement has varied from time to time, payments being made thereon as provided in said agreement, and notes being given for additional loans from time to time as provided for therein. At the present time the indebtedness of plaintiff to the defendant banks secured by the collateral provided for in said agreement and otherwise is in excess of the aggregate amount of plaintiff's indebtedness to said banks at the time said agreement was entered into, and the notes evidencing said indebtedness of plaintiff to said several banks will all become due in the near future, the note first maturing being due January 20, 1922, and that last maturing being due April 28, 1922 and the others falling due between said dates. None of said banks is under any agreement by which it is legally obligated to further extend time to plaintiff for the payment of its indebtedness to them respectively; and if said certificates of deposit should be cashed by said Fidelity and Deposit Company, said banks would be at full liberty and would be entitled to and plaintiff is informed and believes and therefore avers that there is grave danger some or all of them would require plaintiff to make payment of the amount of plaintiff's indebtedness aforesaid, and that should such demand be made, plaintiff would be unable to make such payment except upon submitting to a sale of the collateral security which said The Summit Trust Company holds as Trustee for said banks, as aforesaid, and without otherwise converting assets into cash; and if such action should be taken, said collateral security and other assets of plaintiff would bring at forced sale very much less than their true value and very much less than the accounts and other collateral security held by said The Summit Trust Company for the benefit of said banks would otherwise produce, and thus further great and irreparable loss would be imposed upon plaintiff; all of which can be and will be avoided if the moneys now on deposit with said several banks and against which said certificates of deposit have been issued, as aforesaid, are relieved from the claims of Fidelity and Deposit Company of Maryland, of United States Fidelity and Guaranty Company and of said The Computing Scale Company, and used ex-

clusively as collateral for said loans and applied in payment thereof.

Wherefore, plaintiff prays as in its bill of complaint; and further prays that temporary restraining order will issue, enjoining and restraining the defendant banks and the defendant The Sum-
56 mit Trust Company from selling or otherwise disposing of said collateral which said The Summit Trust Company as Trustee holds as security for the said loans made by said defendant banks to plaintiff; and that a temporary restraining order may issue enjoining the defendant banks and each of them from selling or otherwise disposing of any other collateral security which they or any of them hold as security for said indebtedness of plaintiff to them respectively, and enjoining and restraining said defendant banks and each of them from taking steps to enforce the collection of said amounts owed by plaintiff to them respectively; and that upon hearing herein a preliminary injunction may issue to the same effect.

Plaintiff further prays that the said moneys on deposit in said defendant banks respectively, for which certificates of deposit have been issued, as hereinbefore set forth, may be relieved from all claim of the defendants, Fidelity and Deposit Company of Maryland, United States Fidelity and Guaranty Company and The Computing Scale Company; and that the defendant banks may be ordered and required to apply the amount so on deposit with each respectively upon the amount of plaintiff's indebtedness to each of said banks, before proceeding to enforce their claims respectively against other collateral security or property of the plaintiff; and that all right, title and interest of the defendants, Fidelity and Deposit Company of Maryland, United States Fidelity and Guaranty Company and The Computing Scale Company in and to said moneys and in and to said certificates of deposit representing the same may be forever barred. That said defendants and each of them may be perpetually enjoined from asserting any right, title or interest in or to the same or any part thereof.

RATHBUN FULLER,
BROWN, GEDDES, SCHMETTAU & WILLIAMS,
TRACY, CHAPMAN & WELLES,
Solicitors for Plaintiff.

RATHBUN FULLER,
THOS. H. TRACY,
GEO. D. WELLES,
Of Counsel.

57 STATE OF OHIO,
Lucas County, ss:

Henry Theobald, being first duly sworn, upon his oath says that he is President of Toledo Scale Company, the plaintiff in the above entitled suit; that he is familiar with the facts set forth in the foregoing second amendment to the bill of complaint; and that said facts are true.

HENRY THEOBALD.

Sworn to before me and subscribed in my presence, this 19th day of January, 1922.

(Notarial Seal.) IONE SCHRINEL,
Notary Public, Lucas County, Ohio.

In the District Court of the United States for the Northern District of Ohio, Western Division.

No. 307.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Temporary Restraining Order.

It having been made to appear to the court from the verified bill that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and hearing had upon its motion for a temporary restraining order, in that execution upon the judgment obtained by The Computing Scale Company
58 against plaintiff would be enforced, both by the levy of execution upon plaintiff's property and by the enforcement of the supersedeas bonds given by plaintiff and Fidelity and Deposit Company, and that the result thereof would be great and irreparable loss to plaintiff and injury to plaintiff's credit and business, it is ordered that the defendants and each of them be and they are hereby temporarily restrained and enjoined as follows:

The defendant, the Computing Scale Company, is enjoined and restrained from enforcing or attempting to enforce in any manner whatsoever the judgment entered by the District Court of the United States for the Eastern Division of the Northern District of Illinois in the cause before said court entitled, "The Computing Scale Company, Plaintiff, vs. The Toledo Scale Company, Defendant, No. 30024 in Equity"; and from enforcing or attempting in any manner to enforce payment by Fidelity and Deposit Company of Maryland upon the bonds in the amount of Four Hundred Fifty Thousand Dollars ($450,000.00) and Fifty Thousand Dollars ($50,000.00) respectively executed by plaintiff as principal and Fidelity and Deposit Company of Maryland as surety as supersedeas and stay bonds in said suit; and from in any manner asserting any right or claim based upon or under the said judgment or the decree of the United States Circuit Court of Appeals for the Seventh Circuit affirming the same.

The Fidelity and Deposit Company of Maryland is enjoined and restrained from making any payment to the said The Computing Scale Company or to any one on its behalf, upon or under said bonds herebefore mentioned, or either of them, and from cashing any and all of the certificates of deposit held by said Fidelity and Deposit Company of Maryland as security against its liability on said bonds, and from withdrawing from the defendant banks any of the funds on deposit with them respectively under said certificates of deposit held by said Fidelity and Deposit Company of Maryland as its security on its liability on said bonds.

The defendants, the Second National Bank of Toledo, First National Bank of Toledo, Northern National Bank of Toledo, The Commerce-Guardian Trust and Savings Bank of Toledo and The Guardian Trust and Savings Company of Cleveland, Ohio, and each of them, is enjoined and restrained from paying to or on the order of Fidelity and Deposit Company of Maryland the
59 principal or interest on or upon any of the certificates of deposit issued by them respectively in favor of said Fidelity and Deposit Company of Maryland for certified checks of plaintiff, the principal amounts of said certificates of deposit being in the following amounts respectively:

First National Bank of Toledo, Ohio	$50,000.
Second National Bank of Toledo, Ohio	75,000.
Northern National Bank of Toledo, Ohio	55,000.
The Commerce-Guardian Trust and Savings Bank of Toledo, Ohio	75,000.
The Guardian Savings and Trust Company of Cleveland, Ohio	200,000.

This order shall remain in full force and effect until and including January 19, 1922; and the motion of plaintiff for the issuance of a preliminary injunction herein is hereby set for hearing on January 19, 1922, at four o'clock P. M.

It is ordered that plaintiff give bond for the issuance of this temporary restraining order in the amount of One Thousand Dollars ($1,000), to be approved by this court; and said bond having been filed with the clerk, same is hereby approved.

JOHN M. KILLITS,
Judge.

Toledo, Ohio, January 9, 1922.

60 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, First National Bank of Toledo, Ohio, Second, National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Temporary Restraining Order on Amendment to Bill of Complaint.

This day came the plaintiff and filed its amendment to its bill of complaint heretofore filed herein, and upon its motion the United States Fidelity & Guaranty Company is hereby made a party defendant herein; and it appearing to the court from the verified amendment and the verified bill that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and hearing had upon its motion for a temporary restraining order against said defendant United States Fidelity & Guaranty Company;

It is ordered that said defendant and the defendant The Computing Scale Company are enjoined and restrained from enforcing or attempting to enforce in any manner the judgment entered by the District Court of the United States for the Eastern Division of the Northern District of Illinois, referred to in the original restraining order heretofore made herein against said defendant the United States Fidelity & Guaranty Company, and said United States Fidelity & Guaranty Company is enjoined and restrained from making any payment to said defendant The Computing Scale Company
61 or to anyone on its behalf on or on account of the judgment aforesaid.

This order shall remain in full force and effect until and including January 19th, 1922, and the motion of plaintiff for the issuance of a preliminary injunction upon the amendment to its petition is hereby set for hearing on January 19th, 1922 at 10:00 o'clock A. M.

It appearing that said defendant the United States Fidelity & Guaranty Company as surety executed the bond originally filed herein by The Toledo Scale Company upon the issuance of a temporary restraining order, It Is Ordered that the plaintiff give new bond for the issuance of said restraining order upon the bill of complaint and the restraining order contained herein in the amount of $1,000.00, to be approved by this court and said bond having been filed with the court same is hereby approved.

JOHN M. KILLITS,
District Judge.

Toledo, Ohio, January 11, 1922.

62 EXHIBIT II.

(A true copy of the answer of The Computing Scale Company to the bill of complaint of Toledo Scale Company and copies of the exhibits filed in support of said answer are presented herewith and made a part of this Exhibit.)

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

William D. Snyder, of lawful age, having been first duly sworn, on oath deposes and says:

That for the last twenty-eight years he has been engaged in working in the scale industry except for the period of one year and six months, when he was connected with The National Cash Register Company, and all of his work in the scale industry has been in connection with the manufacture of scales; that he worked for The Computing Scale Company of Dayton from the year 1894 to July, 1901, and from Jannary, 1903, until the present time; that this affiant was well acquainted with Bert W. King, who makes an affidavit in this case, when the said King was in the employ of the said The Computing Scale Company, and this affiant was working along with said King all the time that King was employed by the said The Computing Scale Company, and the work of this affiant brought him into constant contact with the said Bert W. King in the factory and frequently in the experimental room of said factory; that this affiant has read the affidavit of said Bert W. King filed in this action and knows its contents, and this affiant has read the statement in said affidavit of said King to the effect that there were hanging in the experimental room of the said The Computing Scale
63 Company three old scales, apparently identical with a certain scale described in the said affidavit, and this affiant says that there were no such scales hanging in said experimental room and if there had been any scales of the description stated by King hanging there in said room he would have seen and noticed them, and this affiant says that there were no such scales hanging in said experimental room and that there were no old scales at all hanging in the said experimental room;

That this affiant has read the statement in said affidavit of said King that said King took apart and adjusted a certain scale described in said affidavit and this affiant says that if said King had taken apart and adjusted any scale of any such description it would

have been a matter of comment in the said factory and of remark by others employed there, and this affiant would have noticed and seen that such taking apart and adjusting of such a scale was being done, and this affiant says that to his knowledge no such scale was either taken apart or adjusted by said King in said factory, and this affiant says that he never saw or knew of any such scale being in said factory, and further deponent sayeth not.

WILLIAM D. SNYDER.

Subscribed and sworn to before me this 17th day of January, 1922.

[SEAL.] BLANCHE M. COONEY,
Notary Public.

64 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Thomas F. Sheridan, of lawful age, having been first duly sworn, on oath deposes and says:

That he is now and was at all the dates herein stated an attorney at law practicing his profession at the City of Chicago, County of Cook and State of Illinois, and from the time of the filing of the bill of complaint in the case of The Computing Scale Company v. Toledo Computing Scale Company, No. 30024, in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, afterwards the District Court of the United States for said District and Division last named, until after the rendition in the United States Circuit Court of Appeals for the Seventh Circuit of its opinion set forth in the answer herein of The Computing Scale Company as Exhibit A, was one of the solicitors for the said The Computing Scale Company in said cause; that this affiant was present in said Circuit Court of Appeals on January 21, 1913, when the motion and petition of the Toledo Computing Scale Company to dismiss its appeal as to reissued patent No. 11536 and for leave to introduce newly discovered evidence in the District Court of the United States for the Northern District of Illinois, Eastern Division, and in support thereof filed affidavits of newly discovered evidence, and this affiant was also present in said Circuit Court of Appeals on the fourteenth day of May, 1913, when the said Toledo Computing Scale Company filed in said Circuit Court of Appeals its motion to include in the mandate to the said District Court permission to said District Court to entertain and consider and if so advised to grant

an application of the said Toledo Computing Scale Company
65 for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney, of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissued letters patent in suit in said cause, and to rehear said cause on such additional proof and in support thereof filed affidavits of newly discovered evidence; and upon both of said motions the solicitors for the said Toledo Computing Scale Company presented to the court three scales and this affiant believes a cylinder drum which the said solicitors of the Toledo Computing Scale Company claimed were Phinney scales made under the Phinney patent No. 106,869 and in use more than two years prior to the original application of Albert U. Smith for the reissued letters patent in suit; and further deponent sayeth not.

THOMAS F. SHERIDAN.

Subscribed and sworn to before me this 18th day of January, 1922.

[SEAL.] ANNIE C. COURTENAY,
Notary Public.

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al. Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Walter A. Scott, of lawful age, having been first duly sworn, on oath deposes and says:

That he is now and was at all the dates herein stated an attorney at law practicing his profession at the City of Chicago, County of Cook and State of Illinois, and from the time of the filing of the bill of complaint in the case of The Computing Scale Com-
66 pany v. Toledo Scale Company, No. 30024, in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, afterwards the District Court of the United States for said District and Division last named, until after the rendition in the United States Circuit Court of Appeals for the Seventh Circuit of its opinion set forth in the answer herein of The Computing Scale Company as Exhibit A, was one of the solicitors for the said The Computing Scale Company, and this affiant was present in said Circuit Court of Appeals on January 21, 1913, when the appeal in said cause came on to be heard in the said Circuit Court of Appeals and when the said Toledo Computing Scale Com-

pany filed a petition and motion that its appeal be dismissed as to reissued patent No. 11536 with leave to introduce newly discovered evidence in the District Court of the United States for the Northern District of Illinois, Eastern Division, and in support thereof filed affidavits of newly discovered evidence, and at said time, upon the argument of said petition and motion, the solicitors of the Toledo Computing Scale Company presented to the said Circuit Court of Appeals several scales which were then and there claimed by them to be Phinney scales manufactured and in use by one William H. Phinney, patentee of patent No. 106,869, and at said time, after argument by the solicitors for the respective parties and reference to the record in said cause and the evidence of the witness Burkholder mentioned in the answer of The Computing Scale Company herein, the said Circuit Court of Appeals by Circuit Judge Baker presiding in said Court, delivered the opinion which appears and is set forth in the said answer herein; that this affiant, being present in said court and being able to write in shorthand, took down in shorthand the statement of said Judge Baker and afterwards reduced the same to typewriting, and the said opinion as it appears in said answer is a true and correct statement of the remarks of Judge Baker upon the ruling on said motion, and further deponent sayeth not.

WALTER A. SCOTT.

Subscribed and sworn to before me this 18th day of January, 1922.

[SEAL.] BLANCHE M. COONEY,
Notary Public.

67 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al. Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Edward Canby, having been first duly sworn, on oath says that he is a resident of the City of Dayton in the State of Ohio, and has been such resident since the year 1879; that he with O. O. Ozias, now deceased, formed The Computing Scale Company about the year 1892, and that he supplied almost all of the funds for the business of said corporation; that from the very beginning of the business of said company he has been conversant with the affiairs of the company and until the year 1905 continuously from the organization of said corporation was the President of The Computing Scale Company, and as such President took an active part in the management of the business, was thoroughly conversant with the affairs of the said corporation, and as to all the business mat-

ters connected with said corporation he was continuously in consultation with said Ozias and knew intimately the affairs of said corporation; that he was President of the said corporation when in the year 1899, The Computing Scale Company purchased the Smith Re-issued Letters Patent No. 11536 and the business of the Boston Scale Company, and he knows the reasons why the said patent and the business of the Boston Scale Company which owned such patent were purchased; that this affiant talked the whole matter over with the said Ozias, and all of the matters connected with the purchase of said patent and business were fully discussed between them, and the reasons for said purchase were that the scales manufactured under said patent were commercially successful, and large numbers of said scales were being manufactured and had been put into successful use, and so far as this affiant knows, the said Smith scale manufactured under the said patent was the only successful fully automatic computing scale on the market, and was the only computing drum scale, and this affiant says that there was no question whatever raised against the validity of said patent, that no such thing was talked of or mentioned to him by said Ozias, and this affiant says that if such a matter as invalidity had been under consideration by said Ozias, he would have talked of it to this affiant, since it went to the value of the patent.

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This affiant says that he has read the affidavit of Ira Chase Koehne filed in this cause, and that said Ozias mentioned therein died in the year 1911; that Charles James, mentioned in said affidavit, has been dead since 1907, and this affiant says that from his intimate knowledge of the affairs of The Computing Scale Company and its business, if there had been any attempt to design or effort on the part of The Computing Scale Company to obtain a monopoly of the business of manufacturing or selling computing scales, as charged in said Koehne's affidavit, or if said Ozias had been connected with any such effort or attempt or had been in charge of any campaign of The Computing Scale Company for that purpose, he would have been first consulted about it, and would have known about it, and this affiant says that The Computing Scale Company was not nor were any of its officers or directors ever engaged in, nor did they contemplate such a course or purpose or design or effort as to monopolize the computing scale business or any business at all, nor was any such attempt or design or effort or purpose ever mentioned at any conversation of this affiant with said Ozias or at any meeting of any of the officers or directors of The Computing Scale Company, and this affiant says that from his knowledge of the business of The Computing Scale Company he is able to say that the statement of said Koehne in his affidavit as to such matter is untrue.

This affiant further says that upon the purchase of the business and the Smith Re-issued Patent No. 11536, of the Boston Scale Company, The Computing Scale Company at once entered upon the business of developing and manufacturing the said scale, and spent a great deal of money thereon, and in developing a platform type of scale made under said patent; that this affiant knew at the time

the amount that was paid to said Boston Scale Company for said patent and business, and he believes that the amount paid was adequate and that in regard to such purchase nothing was ever mentioned by said Ozias or by anyone else to this affiant regarding any invalidity of said Smith patent or regarding any Phinney scales, and no suggestion was ever made that said patent was not what it purported to be, a good and lawful patent, and this affiant says that if the said patent had not been supposed to be a good and valid patent, the money would never have been paid for its purchase, nor would the money have been expended for the development of the manufacture of scales under said patent.

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This affiant further says that prior to the year 1910 or thereafter until the matter came up in connection with this litigation in some way, he had never heard of the Phinney scales, and said scales had never been mentioned in his presence; that said Ozias had never said to him anything about such Phinney scales, and The Computing Scale Company had never authorized or directed the buying up of such scales, and this affiant says that if the said Ozias had done so or had contemplated doing so, the fact would have been mentioned to this affiant, and nothing of the kind was ever mentioned in the presence of this affiant, either in a private conversation with said Ozias or in a meeting of the officers of The Computing Scale Company, or at any directors' meeting of The Computing Scale Company.

This affiant further says that the statement of said Koehne in his affidavit that he, Edward Canby, the then President of The Computing Scale Company, to said Koehne's personal knowledge, knew of the fact that scales had been manufactured by said Phinney with light-weight indicating cylinders of skeleton construction covered with paper, more than two years before the Smith original application was filed, or at any other time, is untrue in substance and in fact, and this affiant says that he never knew or heard of any such fact, and this affiant says that the statement of said Koehne in his affidavit that this affiant Edward Canby knew at any time that said Phinney scales had been more than two years prior to the filing of said Smith original application, sold and used by a number of users, or that The Computing Scale Company had purchased or caused to be purchased all of said Phinney scales that it could find, or any Phinney scales, is untrue, and this affiant says that he never knew that The Computing Scale Company had in its factory at Dayton at any time a number of said Phinney scales or any Phinney scale, and that he never knew that any Phinney scales had been purchased from users thereof, and that he never knew that Phinney scales had light-weight indicating cylinders covered with paper, and this affiant says that if any such scales considered or claimed to show the invalidity of the patent which all of the officers and directors of The Computing Scale Company considered valid, had been in the factory at Dayton, he would have known of it. And this affiant says that he had no part in and never knew of the purchase or the causing of the purchase of any Phinney scales, and to his knowledge no such purchase was ever made, and if such purchase

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had been made he would have known of it, and this affiant says that he never had any intention, nor does he know of anyone else having any intention to suppress Phinney scales, and the statement in the affidavit of said Koehne that he, said Edward Canby, to affiant's knowledge, was familiar with said purposes and designs, is untrue.

And this affiant further says that by an arrangement between the Moneyweight Scale Company and The Computing Scale Company, The Computing Scale Company gave to the Moneyweight Scale Company the exclusive right to sell its scales throughout the United States except in the States of Ohio, of California and a part of Texas, and The Computing Scale Company at no time mentioned by said Koehne, from 1899 to 1910, had a salesman in New England, and it is untrue that any salesman of The Computing Scale Company was directed to find or buy Phinney scales, or was paid increased compensation therefor.

This affiant further says that the said Ira Chase Koehne represented himself to be a patent attorney and was at one time employed by The Computing Scale Company as such attorney, and that said Koehne was in the employ of The Computing Scale Company as such attorney and was entrusted with the business of applying for and taking out patents, that afterwards said Koehne was ascertained to be unreliable.

EDWARD CANBY.

Subscribed and sworn to before me this 4th day of February, 1922.
[SEAL.] BLANCHE M. COONEY,
Notary Public.

71 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

George M. Ludlow, having been first duly sworn, on oath says:

That prior to the formation of the Moneyweight Scale Company in 1899, this affiant, with his brother Andrew Ludlow, who is now deceased, had formed the Ludlow Manufacturers Agency Company, Incorporated, and such company bought the scales of The Computing Scale Company, paying cash therefor, and sold such scales for its own account in all New England and in certain territory west of the Mississippi and the Missouri Rivers, and that the said Ludlow Manufacturers Agency Company had the exclusive right to sell such scales in New England; that in the year 1899 this affiant, in connection with others, formed the Moneyweight Scale Company, and it bought the scales of The Computing Scale Company, paying cash therefor,

and sold such scales for its own account in all of the United States except Ohio, California and a part of Texas, and said Moneyweight Scale Company had the exclusive right to sell such scales in the territory which it had.

That this affiant knew personally the circumstances of the purchase from the Boston Scale Company of Reissued Letters Patent No. 11536, and it was through the request of this affiant and his brother, and the purchase was made because the said scales made under Reissued Letters Patent No. 11536 and sold by the Boston Scale Company were the only completely automatic computing scales on the market, and such scales had proven a success in the New England territory, and this affiant and his brother urged the purchase for that reason; that nothing was said by anyone against the
72 validity of the patent for such scales at the time of the purchase, but the said patent was considered a good and valid patent and large numbers of scales made thereunder were being sold; that this affiant knew O. O. Ozias and was in constant association with him until the death of said Ozias, and it was never said or suggested by the said Ozias to this affiant that there was any invalidity in the patent for the Boston Butcher Scale, nor did this affiant ever hear it said or suggested by said Ozias that owing to any invalidity in the patent for said scale the business of the Boston Scale Company and the patent for the Boston Butcher Scale could be purchased at a decreased price.

This affiant further says that if there had been any attempt or effort on the part of The Computing Scale Company to obtain a monopoly of the business of manufacturing or selling computing scales, or if O. O. Ozias had been in charge of or connected with any campaign of The Computing Scale Company for that purpose, this affiant would have been consulted about it and would have known about it, since he was an official of the Moneyweight Scale Company, and this affiant says that The Computing Scale Company, to his knowledge, was never engaged in nor contemplated such a purpose or attempt, and no such design or attempt or purpose was ever mentioned at any conversation of this affiant with said Ozias, or in any meeting of the officers or directors of the Moneyweight Scale Company, and this affiant from his long extended knowledge of the affairs of the Moneyweight Scale Company and of The Computing Scale Company, says that the statement of Ira Chase Koehne in his affidavit as to such alleged attempt to monopolize is untrue.

This affiant further says that no such matter as a search for Phinney scales or as the buying up of Phinney scales was ever mentioned by said Ozias or anyone else in this affiant's presence, nor was any search for or purchase of Phinney scales directed or authorized by the governing officers or directors of the Moneyweight Scale Company, and this affiant says that he during the long period from 1899, the date of the buying of said patent by The Computing Scale Company, to the death of said Ozias, did not hear it suggested by said Ozias or by anyone else during that period, or after the death of said Ozias by anyone else, that Phinney scales should be bought up or purchased, nor was any direction ever given to the salesmen of

the Moneyweight Scale Company, who were the only salesmen selling
the scales of The Computing Scale Company in New Eng-
73 land or any states adjacent thereto, to purchase or look out
for Phinney scales, and this affiant says to his knowledge no such purchase was ever made, and if such purchase had been made, this affiant would have known of it because he was in charge of all the salesmen of the Moneyweight Scale Company, and the direction spoken of would necessarily have come through him.

This affiant further says that until long after the suit was brought at Chicago by The Computing Scale Company against the Toledo Scale Company, he had never heard of and had never known of the Phinney scale; that he never knew that at Saugatuck, Connecticut, in the factory bought from the Boston Scale Company, there was any such scale as a Phinney scale; that this affiant was never at the Saugatuck factory but once; that while he was there, he never saw a Phinney scale nor was any Phinney scale spoken of in his presence; that the reason why this affiant was at the Saugatuck factory was in connection with some question which arose as to the tool shop there, and that he was in company with O. O. Ozias, and Phinney scales were not spoken of, and this affiant says that the statement in said Koehne's affidavit that this affiant was familiar with any such alleged fact as that Phinney scales were gathered up in order to suppress them, or for any purpose, by The Computing Scale Company or said Ozias, is untrue, and this affiant further says that the statement in said Koehne's affidavit that it was ever contemplated that a knocker scale should be got out and used by the salesmen selling the scales of The Computing Scale Company, is untrue.

And this affiant further says that from 1895 to 1899, he was well acquainted with the scale industry in New England, and knew the scales that were being sold, and knew the scales that were being met in competition by the Ludlow Manufacturers Agency Company, and this affiant says that there was no such scale as the Phinney scale known to the market, and the only automatic computing drum scale that was on sale in New England or anywhere else was the Boston Butcher Scale.

GEORGE M. LUDLOW.

Subscribed and sworn to before me this 6th day of February, 1922.

[SEAL.] BLANCHE M. COONEY,
Notary Public.

My commission expires July 27, 1922.

74 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Samuel M. Hastings, having been first duly sworn, on oath says:

That in the year 1893, he became a sales agent of The Computing Scale Company as one of the firm of Mills & Hastings, and sold the goods of that company until 1901 when he became a director of The Computing Scale Company; that beginning in the year 1901 he has been continuously up to the present time a director, and beginning in 1905 he has been continuously up to the present time, President of The Computing Scale Company; that he has read the affidavit of Ira Chase Koehne filed in this case; that O. O. Ozias, mentioned in said affidavit, died in the year 1911; that Charles James, mentioned therein, has been dead since 1907, if not earlier; that Joseph Hopkinson, mentioned therein, is now and has been in Europe since about December 1, 1921, engaged in making a survey of European business in connection with the scale industry, and he is not expected back in this country until about September 1, 1922.

That this affiant knew said O. O. Ozias and was in constant association with him from some time in 1893 until the death of said Ozias, concerning the affairs of The Computing Scale Company, and in constant consultation with said Ozias regarding its affairs, and many conversations took place between him and said Ozias regarding the affairs of said company, and this affiant knows that if there had been any attempt or design or effort on the part of The Computing Scale Company to obtain a monopoly of the business of manufacturing or selling computing scales, or if O. O. Ozias had been in charge of or connected with any campaign of The Computing Scale Com-
75 pany to that end, this affiant would have been consulted about it and would have known about it, and this affiant says that The Computing Scale Company was never engaged in nor contemplated such a course or purpose, and no such design or effort or purpose was ever mentioned at any conversation of this affiant with said Ozias or in any meeting of any of the officers or directors of The Computing Scale Company, and this affiant, from his intimate and long-extended knowledge of the affairs of The Computing Scale Company, says that the statement of said Koehne in his affidavit as to such alleged attempt to monopolize is untrue.

This affiant further says that he was conversant with the affairs of The Computing Scale Company during the periods above mentioned, and in 1899 The Computing Scale Company purchased the said Smith Reissued Patent No. 11536, and he knows the reasons for such

purchase, and they were that the Smith scale manufactured under such patent known as the Boston Butcher Scale, seemed to be a good commercial proposition, and many of such scales were being sold, and it was the only completely automatic computing scale upon the market, and this affiant says that the said patent was purchased for such reasons, and this affiant says that what he thought at the time was an adequate price was paid for the business of the Boston Scale Company and the patent; that it was never suggested or said by anyone in his presence that the patent was not a good and valuable patent, or that on account of the older Phinney scales it was invalid, or that such a claim could be made, that The Computing Scale Company at once after the said purchase of said patent began the development and manufacture of said scale under said patent, and spent much money thereon in reliance on the patent and this affiant says that if The Computing Scale Company or its officers had known of any defect in the title or invalidity of the patent, said money would not have been spent.

And this affiant further says that no such matter as a search for Phinney scales or as the buying of Phinney scales was ever mentioned by said Ozias or anyone else in this affiant's presence, nor was any search for or purchase of Phinney scales directed or authorized by the governing officers or directors of The Computing Scale Company, and this affiant says that he during the long period from 1899, the date of the buying of said patent by The Computing Scale
76 Company, to 1910, or thereafter, did not hear it suggested by said Ozias or by anyone else, nor was he informed by anyone that there was any fact known to destroy the validity of said Smith Re-issued Patent. On the contrary, this affiant says that the matter of infringement of said patent was discussed at business meetings of The Computing Scale Company, and the said Ozias was directed to bring suits against all infringers of said patent and that it was in pursuance of such direction that infringement suits were brought, and in reliance upon the validity of said patent.

This affiant says that from about 1901 to October, 1906, the Toledo Scale Company was engaged in competition with The Computing Scale Company, denouncing the drum cylinder scale manufactured by The Computing Scale Company under the Smith patent, in advertisements, in public exhibitions and in salesmen's campaigns, and in attempting to secure legislation against such scale until in October, 1906, the said Toledo Scale Company began the manufacture of infringing cylinder drum scales; that as soon as The Computing Scale Company about the year 1907 was informed of such infringement, it communicated with its sales agent, the Moneyweight Scale Company, and it directed the patent attorneys Staley & Bowman to fully investigate the matter and bring an infringement suit, and this affiant was informed that such full investigation had been made, and The Computing Scale Company and the Moneyweight Scale Company were so informed, and this affiant attaches hereto as Exhibit I the original letter of Staley & Bowman of March 14, 1907, showing the bringing of suits at Toledo.

This affiant says that he never knew or was informed of any reason

for dismissing said suits except the correspondence attached hereto as Exhibits II, III, IV and V, showing why said suits were dismissed.

This affiant says that he never heard or knew of any advice by Church & Church not to press any infringement case in Philadelphia, or of any search whatever for Phinney scales by said Ozias being made, and this affiant says that Church & Church were not kept on retainer by The Computing Scale Company so as to prevent them from disclosing matters concerning The Computing Scale Company which said Church & Church had obtained in their employment as attorneys for The Computing Scale Company; that this affiant supposes and has no reason to doubt that Church & Church are reputable
77 attorneys and that no retainer was or is needed to prevent them from disclosing their client's business, and this affiant supposes that said Koehne as a member of the bar ought to have known at least the fundamental facts of an attorney's duties, and would have known that no such retainer was necessary.

This affiant says that he never knew of, and if it had been a fact he would have known of, any Phinney scales being gathered up by The Computing Scale Company or said Ozias, and this affiant says that no Phinney scales were gathered up in order to suppress them or for any purpose by The Computing Scale Company or said Ozias, and this affiant says that said Koehne's statement that this affiant was familiar with any such alleged purpose or fact is untrue, and this affiant says that The Computing Scale Company had at no time from 1899 to 1910 any salesmen in the New England territory, and all scales of The Computing Scale Company for New England and elsewhere in the United States, except Ohio and California and a part of Texas, were sold by the Moneyweight Scale Company, which bought the product of The Computing Scale Company, and paid for it, and then sold the scales for its own account, and all statements of said Koehne about salesmen of The Computing Scale Company being directed to purchase Phinney scales or being paid additional compensation for buying such scales in the New England territory or anywhere else, is a complete fabrication; and this affiant says that no salesman of the Moneyweight Scale Company was ever instructed to buy Phinney scales, nor was any increased compensation paid therefor.

This affiant says that the Steuart mentioned in the affidavit of Walter U. Smith, who says that either Koehne or Steuart was instructed to buy up Phinney scales and was engaged in that purpose is connected with the firm of Church & Church, and this affiant, through the counsel of The Computing Scale Company, caused him to be interviewed over the long distance telephone at Washington, and said Steuart stated that he was a brother-in-law of His Honor Judge Killitts of this Court, and that the statement that he was sent out to buy Phinney scales or was engaged in doing so, was a lie.

This affiant further says that he has personal knowledge of the reason why Staley & Bowman were not employed to bring the suit in the District Court of the United States for the Northern
78 District of Illinois, Eastern Division, and the reason was their conduct of another patent suit had not been satisfactory, but

no reason was suggested orally or in writing, connected with any Phinney scales or proof thereof, and this affiant says that the conduct of Staley & Bowman in making affidavits in this case and producing letters from Church & Church regarding their client's business, although said letters do not show what was claimed for them, is contrary to the recognized duties of attorneys, as he knows them, and such affidavits for that reason ought not to be considered; that when the counsel for The Computing Scale Company, after seeing the bill of complaint in this cause, communicated by Charles F. Morse over the long distance telephone with said Staley, the said Staley inquired whether The Computing Scale Company desired to retain said Staley & Bowman and were informed that the counsel of The Computing Scale Company desired to know what they knew about the matters stated in the bill of complaint, referring to them, and thereafter said Morse received by mail the original letter in reply, which is hereto attached, marked Exhibit VI and made a part hereof, and this affiant says that the said Exhibit VI fully shows, when taken with their affidavits, the character as attorneys of said Staley & Bowman.

This affiant further says that the men in charge at the factory of The Computing Scale Company at Dayton during any part of the time mentioned by said Koehne, are William H. Sanderson, who is now dead, Geoge W. Kepler, who is now dead, and said Joseph Hopkinson, who is in Europe as above stated.

SAMUEL M. HASTINGS.

Subscribed and sworn to before me this 6th day of February, 1922.

[SEAL.] BLANCHE M. COONEY,
Notary Public.

My commission expires July 27, 1924.

79 EXHIBIT I.

Law Offices,

Staley and Bowman,

Patents and Patent Causes,

Springfield, O.

Paul A. Staley, Border Bowman.

Chas. I. Welch, Asst.

Moneyweight Scale Company, March 14th, 1907.
Chicago.

GENTLEMEN:

Answering your inquiry of the 12th, beg to say that we examined the scale which was recently put out by the Toledo Scale Company in imitation of your drum scale, known as the Boston scale and we

found that the said Toledo scale was, in our opinion, an infringement of three of the patents owned by the Company which manufactures the Dayton scale sold by you, and have, therefore, brought suit against the Toledo Computing Scale Company for infringement of said patents. These patents are reissued patent No. 11,536, and original patents No. 674,883 and 597,300. Two suits under these patents are pending against The Toledo Company in the United States Court for the Northern District of Ohio, the first being filed March 4th and numbered 2032, the other one being filed March 6th and numbered 2033.

It, of course, is true as suggested by you that selling or using these infringing scales would render the person so selling or using liable to infringement as well as the maker, the grant of the patent covering the exclusive right to make, use and sell.

Very truly yours,

STALEY AND BOWMAN.

PAS-G.

80 EXHIBIT II.

Law Offices,

Staley and Bowman,

Patents and Patent Causes,

Springfield, O.

Paul A. Staley, Border Bowman.

Chas. I. Welch, Asst.

April 20th, 1910.

The Computing Scale Company,
Dayton, Ohio.

DEAR SIRS:

Mr. Staley and the writer went over the matter of the infringement of the Smith patents by the Toledo Scale Company. We would advise dismissing the suits at Toledo and bringing suits at Chicago, if the Toledo Scale Company have a place of business at Chicago and are selling infringing machines in Chicago. We assume that they have a place of business and we are sure they are selling, but we would wish confirmation of this before starting the suits.

Yours very truly,

STALEY & BOWMAN.

BB-S.

EXHIBIT III.

March 3, 1911.

Messrs. Staley & Bowman,
Springfield, Ohio.

GENTLEMEN:

Will you kindly inform us whether any suit was brought by yo against the Toledo Company upon Smith reissue patent No. 11,53 and Smith original patent No. 597,300. If such a suit was brough and not prosecuted to trial, we would like to have copies of th papers and of any testimony that was taken.

Thanking you for such information as you can furnish upon thi we remain

Yours very truly,

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
By WALTER A. SCOTT

WAS-W.

81 EXHIBIT IV.

Law Offices

Staley and Bowman,

Patents and Patent Causes,

Springfield, O.

Paul A. Staley, Border Bowman.

Chas. I. Welch, Asst.

March 6th ,1911.

Messrs. Sheridan, Wilkinson, Scott & Richmond,
Marquette Building.,
Chicago, Ill.

DEAR SIRS:

Answering your favor of March 3rd, we beg to state that suit were brought against the Toledo company upon the Smith reissu No. 11,536 and Smith original patent No. 597,300 but no testimon was ever taken in these cases. We are enclosing you copies of th bills and answers. You might return the answers to us when yo are through with them so that our files will be complete. The copie of the bills you may retain as we have an extra copy of these paper

Very truly yours,

STALEY & BOWMAN.

CIW-EKS.

EXHIBIT V.

March 9, 1911.

Messrs. Staley & Bowman,
Patent Attorneys,
Springfield, Ohio.

GENTLEMEN:

We thank you for your letter of the 6th inst., in the matter of the suits against the Toledo Company upon the Smith Reissue Patent No. 11,536 and Smith original Patent No. 597,300.

We were of the opinion that these suits should be dismissed in view of the long delay which has taken place, but before taking any action based on that idea, we felt that we should have your opinion on the subject.

We inclose herewith stipulations providing for the dismissal of both bills without prejudice. If you will sign these stipulations as solicitor for complainant, we will present them to Mr. Rector
82 for his signature, thus getting the field cleared for proceeding with the suit here.

Yours very truly,

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
By WALTER A. SCOTT.

Inclosures.

WAS-W.

EXHIBIT VI.

Law Offices

Staley and Bowman,

Patents and Patent Causes,

Springfield, O.

Paul A. Staley, Border Bowman.

Chas. I. Welch, Asst.

Jan. 17, 1922.

Mr. Charles T. Morse,
709 Harris Trust Bldg.,
Chicago, Ills.

MY DEAR MR. MORSE:

Complying with your telephone request of yesterday I am writing you as to the situation in the Toledo matters and our connection therewith.

As I told you yesterday over the telephone Mr. Bowman was in Toledo yesterday and after going over the entire situation we have decided not to accept a retainer from either side in the injunction proceedings brought to prevent the payment of the claim mentioned by you, but will, of course, be willing to contribute such facts as are in our possession to either party to this litigation.

I might say that we have, however, agreed to take up certain other work for the Toledo Co. but for the present have no general retainer from them and do not expect to accept any special retainer in the matter mentioned above.

Very truly yours,

PAUL A. STALEY.

PS-L.

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EXHIBIT III.

In the District Court of the United States for the Northern District of Ohio, Western Division.

In Equity.

Number —.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al.

Affidavit of Joseph McNally.

STATE OF RHODE ISLAND,
County of Providence, ss:

Joseph McNally, being duly sworn deposes and says as follows:

I am a resident of Pawtucket, R. I., and am the same Joseph McNally who gave an affidavit in this case on December 20, 1921. Since making such affidavit I have thought over the question of the final disposition of my old Phinney scale, and recall that several years after I had retired from the meat business I was approached by one Horton, acting as I believe in behalf of The Computing Scale Company of Dayton, Ohio, who requested me to find this scale, and sell it to him. I located the old scale in my cellar and it had a broken casing and we could not locate the pan. I informed him that the scale was useless for weighing purposes but he said that made no difference as they were interested in the scale only from the standpoint of litigation. I have never been called upon by Mr. Horton or the Company that he represented to give any testimony about the scale, nor was I asked to place any identifying marks on the scale at the time of transfer. I thought this rather unusual if the scale was to be used for litigation. I have never seen the scale since. Horton told me at the time of his said purchase that they cared for nothing in the scale but the indicator drums and

hat it made no difference to them that the other parts were broken r missing.

JOSEPH McNALLY.

Subscribed and sworn to before me at Pawtucket, R. I., this 17th day of January, 1922.

BENJAMIN J. DYER,
Notary Public.

84 In the District Court of the United States for the Northern District of Ohio, Western Division.

In Equity.

No. —.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendant.

Affidavit of Thomas Z. Phinney.

CITY OF WASHINGTON,
District of Columbia, ss:

Thomas Z. Phinney, being duly sworn, deposes and says:

He is of lawful age and is the same Thomas Z. Phinney who gave an affidavit in this case on December 17, 1921. That since that date he has pondered over the subject matter of such affidavit and discussed the same with his wife. He has particularly considered the number of Phinney scales manufactured and sold by either his Father or himself, as related in his said affidavit, and also the area through which said Phinney scales were sold and used. As far as he can remember, there were less than twenty Phinney Self-Reckoning scales sold, and they were all sold in the neighborhood of Pawtucket, R. I. He can place in his memory the actual sale and use of twelve of such scales, all of them in Pawtucket, R. I. with the exception of four, one of which was used by Mr. William Raymond in South Attleboro, Mass.,—only one-half mile from the town of Pawtucket—one in Providence—only four miles from Pawtucket—one in Central Falls, R. I.—only one mile from Pawtucket—and the last in Boston and later in England. This last mentioned scale was taken to England with the idea of organizing a Company and putting the Phinney scale on the market there, his Father to receive one-half of the profits made from such scale business in England, but neither his Father nor himself has ever heard from the man who took the scale to England. Practically
85 all of the scales sold were sold in Pawtucket, R. I. and all of them were manufactured by his Father or himself in Pawtucket.

When in company with Mr. Shurtleff he visited the old Phinney scale users in 1913, he received a definite impression that a continued effort had been made by the representatives of the Computing Scale Company, of Dayton, Ohio, to buy up all of the Phinney scales that had been in use about Pawtucket and vicinity. He heard several of the old users tell of visits from the Dayton Scale Company's representatives who informed them that their Company stood ready to buy their Phinney scale, or any other Phinney scales that they could locate. He remembers that practically this same report was given him by Mr. Patrick Tierney, of 310 Middle Street, Pawtucket, Mr. William Raymond, of South Attleboro, Mass., and Mr. Daniel Horton, of Pawtucket. Mr. Raymond, as he remembers, sold a Phinney scale to the Dayton Company's agent and Mr. Horton sold to the Payton Company not only his old Phinney scale, but also a Phinney scale which he had purchased from Mr. Joseph McNally, of Pawtucket, R. I. Mr. Horton laughingly related to affiant and his Father how he had obtained from the Dayton Scale Company's representative a very high price for one of these Phinney scales—considerably more than the cost of the Phinney scales when they were being manufactured and sold by his Father and himself. Mr. Tierney reported that he had been repeatedly approached by the Dayton Company's agent, with offers to purchase his old Phinney scale, and that the agent had gradually raised the price offered until at one time he offered $25 or $30 for the old scale. Mr. Tierney refused to sell—holding on to the old scale for sentimental reasons. He afterwards—in 1913—allowed affiant to have the scale to help him in establishing the manufacture and use of the Phinney scale by his Father and himself.

The Phinney scales were never advertised except by hand bills, similar to the one attached, and these hand bills were distributed only in the vicinity of Pawtucket, R. I., or at a Fair in one of the adjoining towns. The last use of the hand bills for advertising purposes was at least thirty years ago.

The affiant did not learn of the suit brought by the Computing Scale Company, of Dayton Ohio, against the Toledo Scale Company, until December, 1912, and then only through Mr. Pagelsen, Attorney for the Standard Computing Scale Company, of Detroit, Michigan. At that time he was requested to secure one or more of the old Phinney scales that had been in actual use and accompanied Mr. Shurtleff, the Standard Company's agent in Providence, on a visit to all of the old Phinney scale users then alive. It was in this search that he first learned that all of the old Phinney scales had disappeared, except the one retained by Mr. Patrick Tierney. He did not inform the Toledo Scale Company's attorneys of the reports he had heard of the buying up of practically all the old used Phinney scales by the Dayton Company's representatives at this time, because he considered that the location of the Tierney scale, together with the scales and parts of the scales which he had in his own cellar, was sufficient for the purpose for which the Toledo attorneys had requested him to make the search, to-wit: The establishment of the fact that Phinney scales having cylinders with skeleton end pieces of light wood covered with a paper periphery bearing

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the prices and weights were actually manufactured, sold and used several years before the application was filed by Albert U. Smith, of Saugatuck, Conn., that resulted in the patent numbered Reissued No. 11,536.

THOMAS Z. PHINNEY.

Subscribed and sworn to before me this 17th day of January, 1922.

GENEVIEVE C. CALVERT,
Notary Public.

My commission expires Aug. 1, 1924..

Phinney's Patent.

Self-reckoning Spring Scale.

The Only Practical Price-giving Scale on the Globe.

It has been in constant use for a number of years, and for saving of time and labor it leaves all others behind. It is designed for retail dealers in Markets and Groceries, and for Families and Farmers it will displace all others, as a child seven years old can give the weight and price of any article as readily and correctly as a grown
87 person. When the price only is required, lay the article in the pan and the price is before you.

There Is No Fixing and Setting. No Weights to Be Handled—No Weighting—No Reckoning, and No Mistakes!

For Example: Suppose turkey is selling at 17 cents per pound—what is the price of a turkey? Look for 17 on the front of the scale; then lay the turkey in the pan and the price will appear in the slot above the 17.

A Diploma was awarded by the New England Agricultural Society, at Boston, in 1873, and also by all other exhibitions wherever entered.

We have testimonials from many who have used them for a number of years.

WM. H. PHINNEY,
Pawtucket, R. I.

In the District Court of the United States for the Northern District of Ohio, Western Division.

In Equity.

No. —.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendant.

Affidavit of George Walker.

STATE OF NEW YORK,
County of Kings, ss:

George Walker, being duly sworn, deposes and says as follows:

That he is sixty-two years of age and a resident of Brooklyn, New York, where he is scale expert for the Jacobs Brothers Company, scale manufacturers, at 71 Warren Street, New York City; that he has been in their employ for two years, and before that was scale expert for Landers, Frary & Clark, of New Britain, Conn., having entering their employ in September, 1900. About a year or two after his employment with Landers, Frary & Clark, he remembers that two computing scales manufactured by one Phinney of Pawtucket, Rhode Island, was brought to the factory at New Britain for use in defence in a patent suit then pending in Philadelphia against the Philadelphia agent of Landers, Frary & Clark, Mr. Richard T. Randall. Each of these scales had a case, the base of which was in the form of a round-topped box, from the middle of which at the top was an upright extension which enclosed a counter-balancing spring. The lower part of the case had mounted therein a horizontal shaft carrying a divided drum, and a pinion between the two sections of the drum. The shaft was actuated by a rack, attached to a draw-bar, properly connected with the counter-balancing spring and in engagement with the said pinion. The drums were made of paper shells and wooden end pieces or heads, the shells having a computing table printed thereon for indicating the amount of a commodity at various prices per pound through suitable openings in the case. The case of one scale was made of metal, and the other was of wood. Both of these scales were, soon after being procured, sent to Messrs. Mitchell, Bartlett & Brownell, patent lawyers, of New York City, where they remained for some time. They were finally returned to the factory and placed in his possession, where they remained until he was moved into a new factory building, at which time an order was given to clear out the old accumulations in his room and scrap them. The wooden case was knocked to pieces and only the journal brackets were saved, while the metal case scale was

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thrown into the scrap heap. Neither of these scales have been heard of since. He remembers that the Randall case was not prosecuted by The Computing Scale Company, after the Answer was filed setting forth the old Phinney Scales as a defence. He remembers that when he visited George Geer, butcher, in New Britain, Conn., he was informed by Mr. Geer that he had once owned a Phinney scale with a metal case, but that it had been sold by him to a representative of the Dayton Scale Company.

(Signed) GEORGE WALKER.

Subscribed and sworn to before me, a Notary Public, this 14th day of January, 1922.

[SEAL.] (Signed) C. G. BUCKMAN,
Commissioner of Deeds, City of New York, No. 5,
Residing in the Borough of Brooklyn.

Term expires Jan. 18, 1923.

89 In the District Court of the United States for the Northern District of Ohio, Western Division.

In Equity.

No. —.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendant.

Affidavit of Albert U. Smith.

STATE OF CONNECTICUT,
County of Fairfield, ss:

Albert U. Smith, having been sworn, deposes and says as follows:

That he is a resident of Saugatuck, Connecticut, and is the same Albert U. Smith who subscribed to an affidavit on December 20th, 1921, before Samuel A. Purdy, Notary Public; that since that time he has thought over the statements made in such affidavit and discussed the same with his son-in-law, F. B. Dayton, who had been employed in his scale factory at Saugatuck during the years 1900 to 1912, but that he can think of no incidents to refresh his memory about his early knowledge of the use of Phinney Scales, and cannot definitely remember the name of the merchant from whom the Phinney Scale mentioned as being for some time in his Saugatuck factory was purchased, nor the year in which the search for the outstanding Phinney Scales was made by the representatives of The Computing Scale Company of Dayton; he thinks that he had the

Phinney Scale in his small factory in Saugatuck before 1900 and moved it with the other contents of the small factory to his larger factory in another part of Saugatuck; he remembers that Mr. Ozias saw the Phinney Scale in his Saugatuck factory and directed him to send it to Dayton, but he does not believe Mr. Ozias personally helped in the search for the other Phinney Scales, for if he had he believes he would have asked him to accompany him on such search, as they were usually together when Mr. Ozias was in the East; that he was in the employ of The Computing Scale Company of Dayton until the expiration of his patent in September, 1912, and
90 as such was a competitor of, and so hostile to, The Toledo Scale Company, that for several years after his employment was terminated he was on very friendly terms with the head men of The Computing Scale Company, and that even to this day his sympathies, as between the two Companies are with the Dayton Company; that he is willing to make this affidavit now only because he will not suppress the truth, and he refuses to make a trip to Toledo to testify in behalf of the Toledo Scale Company.

ALBERT U. SMITH.

Subscribed and sworn to before me, a Notary Public, this 14 day of Jan. 1922.

FREDERICK BRADLEY.

United States District Court, Northern District of Ohio, Western Division.

In Equity.

No. —.

TOLEDO SCALE COMPANY, Plaintiff,

v.

THE COMPUTING SCALE COMPANY, FIDELITY & DEPOSIT COMPANY of New York, First National Bank of Toledo, Ohio; Second National Bank of Toledo, Ohio; Northern National Bank of Toledo, Ohio; The Commerce-Guardian Trust & Savings Bank, Guardian Savings & Trust Company, Defendants.

Affidavit.

STATE OF OHIO,
County of Lucas, ss:

Charles W. Owen, being first duly sworn, deposes and says as follows:

I reside at Toledo, Ohio, and am a member of the patent law firm of Owen, Owen & Crampton. I have been engaged in the patent practice for more than twenty years and have repeatedly during such

period been called upon to compare mechanical structures,
91 to determine similarities in the mechanical details and functions thereof, to consider and pass upon the equivalency of parts, and to consider the patentability of mechanical structures and the validity of patent claims.

I have examined the reissue patent No. 11536 to A. U. Smith, dated April 28, 1896, and particularly claims 5 and 6 thereof, and the indicator drum structure called for thereby, and understand the same.

I have also carefully examined (1) a scale stamped on its face "Wm. H. Phinney, Pawtucket, R. I., Pat'd Aug. 30, 1870," and bearing a tag marked "The Computing Scale Co. vs. Toledo Computing Scale Co., Equity No. 30024. Defendant's Providence Exhibit No. 1;" (2) a scale stamped on its face "Wm. H. Phinney, Pawtucket, R. I. Pat'd Aug. 30, 1870," and bearing a tag marked "The Computing Scale Co. vs. Computing Scale Co. No. 30024. Defendant's Providence Exhibit No. 2;" (3) a scale designated on its face "Phinney Self Reckoning Scale" and stamped "Pawtucket R. I. Pat'd Aug. 30, 1870," and bearing a tag marked "The Computing Scale Co. vs. Toledo Computing Scale Co. Equity No. 30024. Defendant's Providence Exhibit No. 3," and (4) what purports to be a pair of scale indicator drums and operating rack bearing a tag marked "The Computing Scale Co. vs. Toledo Computing Scale Co. Equity No. 30024. Defendant's Province Exhibit No. 4."

I have compared claim 5 of the said Smith reissue patent No. 11536, and the subject matter to which it pertains, with the indicator drums of the said exhibits and it is my unqualified opinion that each of said indicator drums contains every element of said claim, namely, "a spindle provided with a plurality of skeleton frames of light material and secured to said spindle and having secured to their peripheries a sheet of paper forming a cylinder;" that the parts of the indicator drums of the said exhibits are assembled in exactly the same relation and secured together in the same manner as the parts of the indicator drum of the said Smith patent, and that if said exhibit scales were in public use prior to the conception of the subject matter of said claim 5, or for more than two years prior to the filing date of the original Smith patent of which said patent No. 11536 is a reissue, each of said exhibits would constitute a full, complete and unquestionable anticipation of said claim.

I have compared claim 6 of said Smith reissue patent No.
92 11536, and the subject matter to which it pertains, with the indicator drum of each of said exhibits and I find, and am of the opinion, that the indicator drum of each of said exhibits includes each and every element of said claim 6 specifically as and in the arrangement called for, namely, "a spindle provided with a plurality of skeleton discs or frames of thin aluminum having a sheet of paper extending around and secured to their peripheries to form a cylinder," except that in each of the indicator drums of the exhibits the skeleton discs or frames are not of aluminum but of an equivalent light material to aluminum, namely, wood. I further find from a reading of the specification of said Smith reissue patent,

that the stated object of the construction and material used in the Smith indicator drum, so called for in claims 5 and 6 of such patent, was merely to obtain lightness in construction of the indicator drum so as to render it sensitive to weights of small amounts, and that such lightness was obtained by providing the drums with skeleton discs or frames of thin aluminum carried by a spindle and having a sheet of paper extending around and secured to their peripheries to form a cylinder.

Aluminum was in existence and well known in 1870, the year stamped on the Phinney exhibit scales, but, with the processes then known the cost of extraction of aluminum from its ores was so high that a pound cost about $20.00 and was therefore prohibitive for commercial use. Since 1876 improved methods of extraction have reduced the cost to considerably less than a dollar a pound and it has since gone into quite extensive use mainly due to its remarkable characteristics of lightness, compared with other metals, its specific gravity being 2.56 or about ⅓ that of iron. Other well known characteristics of aluminum which render it valuable for commercial use are freedom from tarnish, and ease of working.

In view of the characteristics of aluminum which were well known at the date of conception of the Smith indicator drum covered by his reissue patent No. 11536, I am of the opinion that no invention was involved in using aluminum in place of wood, or some other light material, for the skeleton discs or frames of the Smith drum, and that if the said Phinney exhibit scales were in public use prior to the conception of the subject matter of claim 6 of the said Smith patent or for more than two years prior to the filing date of
93 the original Smith patent of which said patent No. 11536 is a reissue, each of the exhibit scales or drums is a full, complete and unquestionable anticipation of such claim and that the claim is invalid.

CHARLES W. OWEN.

Sworn to before me and subscribed in my presence this 19th day of January, 1922.

[SEAL.]

——— ———,
Notary Public, Lucas County, Ohio.

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY & DEPOSIT COMPANY of Maryland, United States Fidelity & Guaranty Company, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Affidavit of Albert H. Meads.

STATE OF OHIO,
Lucas County, ss:

Albert H. Meads, being first duly sworn, deposes and says that he is an attorney-at-law with offices in the City of Chicago, in the State of Illinois; that he was engaged in the practice of law in said city of Chicago for more than thirty-four years last past.

Affiant further states that he was one of the solicitors for
94 the Toledo Computing Scale Company, defendant in the suit filed in the United States Circuit Court for the Southern District of Ohio, in which The Computing Scale Company of Dayton, Ohio, was plaintiff, and in which suit said plaintiff sought to obtain an injunction to restrain the distribution of circulars by the Moneyweight Scale Company, distributing agents of said Computing Scale Company of Dayton, Ohio, and in which suit it was claimed that by the use of the scales manufactured by said Computing Scale Company one dealing in meat might buy meat at nine cents a pound, retail his meat to his trade at the same price and get his money back and a three per cent profit besides; that a preliminary injuncton was granted in said suit restraining said Toledo Computing Scale Company from circulating such circulars, and that thereafter said cause was appealed to the United States Circuit Court of Appeals, Sixth Judicial Circuit, and such order of preliminary injunction was reversed for the reason that the said Toledo Computing Scale Company had been warranted is its statements as to the dishonesty of the scales manufactured by said Dayton Computing Scale Company, and that said scales were in fact dishonest. That the opinion of said Circuit Court of Appeals was filed on January 10, 1906, and is reported in Volume 142 of the Federal Reporter on Page 919, reference to which is hereby made.

That after the decision by said Court of Appeals proof was taken in said cause by the parties thereto, said cause was tried in the District Court of the United States for the Southern District of Ohio, and that on or about June 30, 1914, said District Court rendered its opinion which was filed in said cause, in which said opinion the said District Court found that "the taint of uncleanness pervades

complainant's entire suit", a copy of which opinion is hereto attached and marked Exhibit A.

Affiant further states that after the rendition of said opinion in said Circuit Court of Appeals for the Sixth Circuit and in the year 1907 a bill was filed in the Legislature of the State of Massachusetts entitled "An act to provide for the testing and sealing of weights, measures and balances, having a device for indicating the price as well as the weight of commodities offered for sale." That affiant, together with Henry Theobald, President and Manager of the Toledo Computing Scale Company, visited the City of Boston in said State of Massachusetts to aid in the passage of such act by the Gen-
95 eral Court of such Commonwealth, and that by such proposed act it was provided that a "sealer or deputy sealer shall seal such device when tested and found correct, or shall mark condemned or seize such device if incorrect."

Affiant further states that at the time when said Henry Theobald and this affiant were attempting to further the passage of such proposed act the Moneyweight Scale Company, distributing agent for the Computing Scale Company of Dayton, Ohio, was present in said City of Boston by its attorneys and agents and also actively opposing the passage of said act which was known as Senate Bill No. 174, and that the representa-ives of such Moneyweight Scale Company so opposing the passage of such act were G. O. Ozias, director of said company, John M. Zane, counsel for said company, Coolidge & Hight, counsel for such company, Robert A. Southworth, attorney for such company, Charles F. Morse, director and counsel for such company, and W. P. Rice.

Affiant further states that in and by the laws of said Commonwealth of Massachusetts it is provided that within thirty days after the prorogation of the General Court every person, corporation or association whose name appears upon the dockets as employees of any legislative counsel or agent shall render to the Secretary of the Commonwealth a complete and detailed statement under oath of all expenses incurred or paid in connection with the employment of legislative counsel or agents, or with promoting or opposing legislation, and that such statements shall be in such form as the Secretary of the Commonwealth may prescribe and shall be open to public inspection. That in pursuance of such statute the said Moneyweight Scale Company did file in the office of the Secretary of State of said Commonwealth a statement of money expended by it in the matter of the opposing of such legislation, and that by such statements it is shown that the said company expended the sum of $3,650.00 in its efforts to defeat such legislation, a copy of the statement made by said Moneyweight Scale Company duly certified by the Secretary of said Commonwealth of Massachusetts being hereto attached and marked Exhibit B.

Affiant further states that after the said Moneyweight Scale Company was unsuccessful in its efforts to defeat such legislation and on or about the 29th day of November, 1907, it filed its bill in the Supreme Judicial Court of Massachusetts to restrain Felix McBride,

Sealer of the City of Cambridge, from condemning scales
96 manufactured by The Computing Scale Company, for which such Moneyweight Scale Company was distributor, and which the said McBride held to be dishonest. That this affiant was one of the solicitors for said Felix McBride, Sealer of said City of Cambridge, in said suit and that upon a trial of said cause the bill of complaint of said Moneyweight Scale Company was dismissed for want of equity, and that thereafter the said Moneyweight Scale Company appealed from such decision to the Full Bench of said Supreme Judicial Court of Massachusetts, and that such cause was heard by said Full Bench of said Supreme Court, and that upon the hearing of said cause this affiant was one of the attorneys for said Felix McBride and made an argument in said cause upon his behalf, and that afterwards and on or about October 19, 1906, said Full Bench of said Supreme Judicial Court filed its opinion in said cause, a copy of which opinion is hereto attached marked Exhibit C, said opinion being reported in 199 Mass. Rep. Page 503.

That after the rendition of said opinion by said Massachusetts Supreme Court the said Moneyweight Scale Company brought said cause to the Supreme Court of the United States for review alleging that the said act of the Commonwealth of Massachusetts and the acts of said Felix McBride as Sealer of the said City of Cambridge deprived it, the said Moneyweight Scale Company, of its property without due process of law. That the record was printed in said cause and the said Felix McBride, by Gilbert A. A. Pevey and this affiant prepared his briefs for the hearing in said United States Supreme Court, and this affiant went from his home in the City of Chicago to the City of Washington, D. C. to argue such cause in said United States Supreme Court but the said Moneyweight Scale Company dismissed its appeal in said cause without hearing upon the day when said cause was set for argument.

Affiant further states that while the said suit in the District Court of the United States for the Southern District of Ohio above mentioned was still pending, and in the year 1909 the said Moneyweight Scale Company in its efforts to annoy and harass the said Toledo Computing Scale Company, instituted a suit in the Circuit Court of the United States for the Northern District of Illinois in the Eastern Division against said Toledo Computing Scale Company, in which
suit the attorneys for the plaintiff were solicitors for the plain-
97 tiff in said suit in said Southern District of Ohio, and in and by said suit so instituted in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, the said Moneyweight Scale Company sought to recover from said Toledo Computing Scale Company the sum of $100,000.00 for damages alleged to have been suffered by said Moneyweight Scale Company by reason of the publication by said Toledo Scale Company and its agents of statements concerning the inaccuracy and dishonesty of the scales manufactured by said Computing Scale Company which were the subject of the litigation in said suit in said Southern District of Ohio.

That a declaration was filed by the plaintiff in said suit in the

Circuit Court of the United States for the Northern District of Illinois, and pleas filed by the defendant therein, and that the said Toledo Computing Scale Company was put to large expense in the matter of said cause and that although said cause was pending in said Circuit Court of the United States for the Northern District of Illinois for almost ten years the said plaintiff never caused the same to be set down for trial but the same was dismissed when called for trial on or about April 8, 1919, for want of prosecution on the motion of the defendant.

Affiant further states that in the spring of the year 1913 a bill was introduced in the Legislature of the State of Ohio to amend Section 13106 of the General Code by providing that "whoever uses in the sale of a commodity a computing scale or device indicating the weight and price of such commodity, upon which scale or device the graduations or indications are false or inaccurate placed, either as to weight or price, shall be fined not more than $50.00."

Affiant further states that The Toledo Computing Scale Company employed this affiant to aid in the passage of such proposed amendment and that this affiant visited the City of Columbus in the State of Ohio at various times with representatives of said Toledo Computing Scale Company and did interview various legislators in said City of Columbus in an endeavor to procure the passage of such amendment. That the passage of such amendment was opposed by the agents of the Computing Scale Company of Dayton, Ohio, and that after such Act had passed the Legislature of said state, the representatives of said The Computing Scale Company of Ohio sought to have the same vetoed, and that this
98 affiant, together with Henry Theobald, President of said Toledo Computing Scale Company, appeared before the Governor of said State in opposition to the efforts of said The Computing Scale Company to cause such act to be so vetoed.

Affiant further states that he was one of the solicitors for the Toledo Scale Company in the matter of the accounting in case No. 30024 in the Northern District Court of Illinois, Eastern Division, wherein the Computing Scale Company was plaintiff and the Toledo Scale Company was defendant, and that he did not learn until January 18, 1922, that said Computing Scale Company had ever purchased from various parties in the State of Rhode Island or elsewhere various computing scales known as the Phinney scales, and that affiant never had any knowledge or information until January 18, 1922, that any officers, directors, legal counsel or other persons connected with said The Computing Scale Company had knowledge of the manufacture, sale and use of said Phinney scales more than two years prior to the filing of the original application for the Smith cylinder computing scales at the time said cause No. 30024 in the Eastern Division of the Northern District of Illinois was first submitted on its merits in said court, and that he first acquired the knowledge of the purchase of such Phinney scales by said Computing Scale Company and the knowledge that its officers, agents and attorneys knew at the time of the trial on the merits of said cause No. 30024 that such Phinney scales had been in general

use for more than two years prior to the application of said Smith patent by reading on January 18, 1922, certain affidavits entitled in the above cause.

Further affiant saith not.

ALBERT H. MEADS.

Sworn to before me and subscribed in my presence this 19th day of January, 1922.

[SEAL.]

———— ————,
Notary Public, Lucas County, Ohio.

99 *The Opinion.*

District Court of the United States, Southern District of Ohio, Western Division.

No. 5963.

THE COMPUTING SCALE CO., Complainant,

vs.

TOLEDO COMPUTING SCALE CO., Defendant.

June 30, 1914. (Filed.)

HOLLISTER, *District Judge:*

A motion for a preliminary injunction having been granted the complainant by Judge Thompson, this case was appealed to the circuit court of appeals. The order of the court below was reversed and the case sent back for trial on the merits.

A consideration of the opinion of that court induces the conclusion that the scope of this court's inquiry is restrained to narrow limits. In that opinion, after describing the scales and the complainant's circular beginning, "Can You Do This?" and the respondent's circular headed: "Shameless Admission," Judge Severens says (142 Fed. 919, 925):

"It is only necessary to say that the proof is amply sufficient to show that if the appellee's scales are not deceitful and fraudulent, the conduct of the appellant was such as justly entitled the appellee to the injunction which the court ordered, or other appropriate remedy. If, on the other hand, the character of the appellee's scale and business was of the character charged, the injunction should not have been allowed, and this would be so on a ground quite independent of the merits of the appellant."

This leaves open only the question of the character of the complainant's third variety of scales constructed on the second principle described in the amended and supplemental bill known as number 63 and called "Butchers' Scale." If it is not deceitful and fraudulent, the acts of the respondent are reprehensible indeed;

but if it is deceitful and fraudulent, then, of course, the
100 complainant here can have no relief, whatever be the nature of the respondent's conduct. There is, therefore, to be decided here the single question, whether or not the complainant's "Butchers' Scales" is an honest scale. If it is, a perpetual injunction must issue; if it is not, complainant can have no relief in a court of equity. In concluding his opinion, Judge Severens says:

(P. 927: "Alleged inaccuracies in the designation of whole prices by which they are made greater than they should be, even upon the scheme on which the scale is in fact constructed, are pointed out by counsel for appellant. But these are not so clearly demonstrated by the present record as to justify a definite conclusion.

"We should require the impression which we get of the appellee's scale, and the business of making and selling it from its circulars and instructions, to be removed before we could sanction the employment of the process of the court in its protection. As the proof, so far, only serves to deepen it, we must reverse the order granting the injunction, and direct that the cause be proceeded with in due course."

It is admitted by the defendant that the graduations of weight found in the complainant's "Butchers' Scale" are correct; that is to say, that when the scale is used as an ordinary avoirdupois weighing scale, the weight of the commodity, when placed on the platform of the scale, will be accurately shown on the middle of the chart where the graduations of weight are exposed to view—that is to say, accurately shown to the ounce, though not fractions of an ounce, and this is admitted by the respondent to be, in this respect, a proper scale for a butcher to use, and, in its use in that way, the butcher may, as he does in common practice with ordinary scales, when a fraction of a cent is one-half or greater, take the half cent himself, and when the fraction is less than one-half, give the fraction to the customer.

It is claimed by the complainant that on the chart are printed the ultimate number of cents which represent the value of the article weighed at the money value in cents per pound, with only such departure from absolute accuracy as is involved in transactions in which the ultimate figure shown does not include the one-half cent, and that the dealer can easily tell by the location of the
red line on the glass of the slit relative to the figure shown
101 on the chart, to whom the one cent ought to go under the commercial usage. But the respondent claims that the arrangement of figures on the chart is such that in many cases opportunity is given the dealer to obtain not only the half cent which by commercial usage, he would be entitled to, but, in some instances, the other half cent also; and that when a customer calls for a given number of cents' worth of a commodity at a fixed price per pound (in which case he is buying by weight and is, of course, entitled to an exact weight) the dealer may appropriate to himself the larger part of an ounce, and, as shown by some of the demonstrations, even more than an ounce. The opportunity for this is much greater

when the figures in the lower row of figures appearing in the slit are read, which method of reading complainant instructed dealers to use.

It was not until after the case was remanded to this court that complainant in its supplemental bill, described a fine line printed upon the magnifying glass over the slit—or the same purpose effected by a fine wire running lengthwise from the middle of the slit immediately behind the glass. The apparent purpose of this was to direct the dealer's attention, not to the lower row of figures on the chart, but to such figures as would appear immediately behind the line or wire.

But it was shown by many demonstrations (a list of which was submitted with the papers but which cannot now be found) that while a reading of the chart, assisted by the wire, would result in greater accuracy than by reading the lower row of figures, still the chart was shown to be inaccurate by the demonstrations made by counsel and by others made in this investigation. It appears that even when the dealer is guided by the figure appearing immediately behind the line, there may be many transactions in which not only would the dealer appropriate both fractions of a cent, but, in many instances, if the article were purchased by the cents' worth, appropriate fractions of an ounce, and even more. Of course, as the machine could be—and in practice was—used both when an article was purchased by weight and when it was purchased by cents' worth, the complainant must be held to have contemplated its use either way.

That a customer may lose as much as even two ounces to which he is entitled, is shown by one of the demonstrations made by counsel for the respondent. If a commodity has the value of 4c per pound and a customer asks for 9c worth, the first figure "9" to appear immediately behind the red line has opposite to it on the weight graduation, 34 ounces. The customer is entitled to 36 ounces.

102 It is true that when two ounces of the commodity are added, making 36 ounces, the red line would indicate the figure "9" in alignment with the figure "4" indicating cents per pound. In other words, unless the dealer knows that in a transaction of this description that the ultimate figure "9" at 4c per pound will indicate on the weight graduation both 34 and 36 ounces, and that a customer is entitled to have the second figure, coming into alignment with the 4c per pound, read, the customer will be short-weighted two ounces.

In as much as the purpose of the red line in most transactions is to fix the figure coming into alignment behind it at the specified price per pound, and since in weighing the article in the illustration given the figure "9" first appearing when the commodity is placed upon the scale is read, it is quite clear that the ordinary dealer would, with absolute honesty, give his customer two ounces less than he was entitled to receive.

An illustration of how the dealer gets more than the half cent which, in any event, he would be entitled to, is shown by a transaction in which 1 lb. and 9 ozs. of a commodity is called for which has a fixed value of 25c a pound. When that weight is placed upon the

scale, the red line falls exactly between the figures 38 and 41 when coming into alignment with the figure indicating 25c per pound. The dealer would calculate 39½c as the value, since that is exactly between 38c and 41c. Under the commercial custom, the dealer would be entitled to charge 40c when in fact 1 pound and 9 ounces at 25c is worth 39.06 cents.

Again, as illustrative of the way in which a purchaser may not get the weight of the article he is asking for, take a transaction in which the purchaser asks for 5c worth of an article, the fixed price of which is 9c per pound. The red line, when the 5 on the chart is brought into sight at the middle on the slit in alignment with the 9c per pound figure below the slit, the weight indicator will show exactly 8 ounces; but a calculation shows that 5c worth of an article at 9c per pound is 8 8-9 ounces. Hence in such transaction the purchaser would be entitled to 8-9 of an ounce more than he gets. In other words, the purchaser would be entitled to about 1-10 of the article more than he received.

Illustrations might be multiplied indefinitely. A very lucid demonstration is found in Moneyweight Scale Co. v. McBride, 199 Mass. 503, in which Judge Loring shows with great clearness how
103 the dealer gets the fraction of a cent twice when he is asked for a certain weight of an article at a fixed price in cents per pound, and also how the customer gets less than the amount in weight to which he is entitled when he asks for so many cents' worth of an article at a fixed price per pound; and he shows in the illustration given by him that the fraction of a cent to which the dealer in the transaction would be entitled is already included within the figure on the chart in alignment with the figure indicating the cents per pound, and for this reason, when the transaction by calculation from the location of the figures gives the dealer the half cent, he gets it twice.

An examination of the chart shows that in the first four columns, corresponding respectively with 4, 5, 6 and 7 cents per pound, the figures come into line in the first column in duplicate; that is to say, two ones, two twos, two threes, two fours, etc.; and in the second column duplicates begin at 3 and are found frequently in that column. In the third column the duplicates begin with the twos, and are found frequently. In the fourth column they begin with the elevens and are found with much less frequency. In the fifth column the numbers run in arithmetically correct sequence. In the columns which follow, the numbers drop out in arithmetical sequence occasionally, and when the columns in alignment with the larger numbers per pound, such as 24 and 25 as illustrations, there are sometimes as many as two figures dropped from the chart, and in the last column as many as three.

Experiments with the columns in which there are duplicates of the same figures bring results such as are shown in the illustration by Judge Loring. On the other hand, if an illustration is taken from the sixth column in alignment with 9c per pound and the amount purchased, say is 3 pounds and 7 ounces, the line is exactly between the figures 30 and 32; that is to say, 31c. The calculation shows that

the exact amount to which the dealer is entitled would be 30.93 cents, a fraction which would entitle him to charge 31 cents.

Again, using as an illustration, a call for, say 10c worth of an article at 17c per pound, the customer would be entitled to 9 ounces, the actual value of which would be 9.5625 cents, and the dealer would be entitled to 10 cents. And here it will appear that an advantage accrues to the customer because 10c worth at 17c per pound and 10c worth at 18c per pound each show 9 ounces on the weight graduation.

104 But again, if one pound and nine ounces of an article were wanted at the specified price of 22c, then the line would fall immediately between the figures 33 and 36; that is to say, the dealer would be entitled to charge, on the face of the chart, 35c. But one pound and nine ounces at 22c is worth exactly 34.375 cents, and the customer should not pay over 34c.

So, while no doubt in many instances, whether buying by weight or by the cents' worth, the scale does exact justice commercially between the dealer and his customer, yet the chart is so constructed that in a great many instances, the dealer makes more than the one-half cent to which he is entitled commercially when the article is sold by weight and he sells less than the customer is entitled to when he buys by the cents' worth.

These demonstrations are sufficient to warrant the court in believing the complainant's circular to the effect that a dealer using one of its "Number 63" butchers' scale could sell at cost and make a profit of 3 per cent.

Surely as against the attacks upon this scale the complainant can have no relief, but the complainant says that the attacks of the respondent have been upon all of the complainant's barrel-shaped scales, even though they are confessedly accurate, and claims that an injunction should issue against such attacks set forth in the amended and supplemental bill and proved in the case. The answer to this is that the court of appeals have said that if the complainant's scale was of the character charged, the injunction should not have been allowed, and this on a ground quite independent of the merits. But aside from this, it may be said that the taint of uncleanness pervades complainant's entire suit and some of respondent's improper attacks on complainant's other barrel-shaped scales are so combined with quite justifiable attacks on complainant's Butchers' Scale No. 63, that it is difficult to separate them. If complainant wishes relief against respondent's attacks on its other barrel-shaped scales, its rights can be shown in another suit brought for the purpose. The respondent may take a decree at complainant's costs.

(Signed) HOLLISTER, *District Judge.*

ZANE, MORSE, McKINNEY & McILVAINE,
Attorneys for Complainant.

BROWN, GEDDES, SCHMETTAU & WILLIAMS,
ALBERT H. MEADS,
Attorneys for Defendant.

105 EXHIBIT B.

The Commonwealth of Massachusetts,

Office of the Secretary,

Archives Division,

Boston, 9.

January 14, 1922.

I hereby Certify the attached to be *Trust* Copies of the Originals on file in the Archives Division of this Office.

Witness the Great Seal of The Commonwealth.

(Signed) F. W. COOK,
[SEAL.] *Secretary of the Commonwealth.*

EXHIBIT B.

Commonwealth of Massachusetts.

(Chapter 3, Revised Laws.)

Section 30. Within thirty days after the prorogation of the general court, every person, corporation or association whose name appears upon the dockets so closed, as employers of any legislative counsel or agent, shall render to the secretary of the commonwealth a complete and detailed statement, under oath, of all expenses incurred or paid in connection with the employment of legislative counsel or agents, or with promoting or opposing legislation. Such statements shall be in such form as the secretary of the commonwealth may prescribe and shall be open to public inspection.

July 24, 1907.

Pursuant to the provisions of chapter 3, Revised Laws, Money-weight Scale Company, an Illinois Corporation, hereby returns a complete and detailed statement of all expenses incurred or paid by it in connection with the employment of legislative counsel or agents, or with promoting or opposing legislation by the general court, at its last session, viz:

06 To whom paid or due (name of counsel or agent).	Purpose for which paid or incurred (specify legislation for which entry was made.)	Amount.
. O. Ozias.....	Director of the Company, attended the hearing at State House, but was paid nothing for his services.	
ohn M. Zane.....	Counsel; appearance before Committee arguing relative to Senate Bill Number 174..	$450.00
oolidge & Hight.....	Counsel; advice and consultation	No charge.
obert A. Southworth..	Attorney; professional services in reference to Senate Bill Number 174.....	$2,500.00
harles F. Morse.....	Director and Counsel of the Company; trips Chicago to Boston in advisory capacity.	700.00
V. P. Rice.....	For printed copies of documents placed before members of Legislature	20.00

(Signed) MONEYWEIGHT SCALE COMPANY,
By SAMUEL M. HASTINGS,
Treasurer.

STATE OF ILLINOIS,
County of Cook, ss:

July 24, 1907.
Subscribed and sworn to before me.
(Signed) BERTHA NATHANSON,
Notary Public.

(Exhibit C to the foregoing affidavit is a copy of the opinion of the Supreme Court of Massachusetts in the case of Moneyweight Scale Co. v. McBride, 199 Mass. 503.)

107 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Herman C. Singer, being first duly sworn, deposes and says that he is a resident of the City of Chicago in the County of Cook and State of Illinois, and is now and has been for more than twenty years last past engaged in the business of selling automatic computing scales.

Affiant further states that during the summer of 1902 he was employed by the Moneyweight Scale Company, distributors of the Computing Scale Company of Dayton, Ohio, at Chicago, Illinois, but was sent by his employers, together with some six other salesmen of said Moneyweight Scale Company, to the City of St. Louis, in the State of Missouri, for the express purpose of obstructing the business of the Toledo Computing Scale Company, recently instituted in said last-named city. That during the time the affiant was in St. Louis, he and the other salesmen of the Moneyweight Scale Company were supplied with a sample springless scale, which was known to the salesmen and other employees of the Moneyweight Scale Company as the "Toledo knocker" scale and was so designated on the charge slips upon which the sales in the custody of the various salesmen were charged or recorded.

Affiant further states that he was instructed that whenever he learned of the demonstration of a Toledo scale to display the so-called "knocker" scale and to endeavor, by offering it at a much
108 lower price than the price of the Toledo scale, to prevent the sale of the Toledo scale. The affiant further states that to the best of his knowledge and belief none of the so-called "knocker" scales that were sold at that time at St. Louis were ever delivered to purchasers, and that none of the so-called "knocker" scales that he personally sold were ever delivered.

Affiant further says that afterwards, to-wit during the month of September, 1902, he entered the employ of the Toledo Computing Scale Company, and that soon after entering the employ of the Toledo Computing Scale Company the Dayton Computing Scale Company brought suit against him for alleged infringement of a patent, and that he is informed and believes that said Dayton Computing Scale Company about the same time brought similar suits

ainst the Toledo Computing Scale Company and Harry F. Ander-
n, now deceased, another of its salesmen, and against certain users
Toledo scales; that none of the said suits were prosecuted, but
at the Dayton Computing Scale Company scattered broadcast cir-
lars advertising said suits like the circulars attached to the deposi-
on of Henry Theobald filed in the Circuit Court of the United
ates in the case of Toledo Computing Scale Company vs. Money-
eight Scale Company, Number 27617, as Complainant's Exhibits
)" and "G"; that the circular marked Complainant's Exhibit "D"
the prior suit, above referred to, contained a cut purporting to
lustrate a scale made by the Computing Scale Company and marked
The Genuine" and a cut illustrating a scale made by the Toledo
omputing Scale Company and marked "The Imitation", with the
atement that the scale alleged to be the imitation was made by
would-be" competitors.

The affiant further says that the scale so designated "The Imita-
on" had been sold to his knowledge by said Toledo Scale Com-
any and its predecessors for approximately three years prior to
he publication of such advertisement, while the scale so designated
The Genuine" had not been sold or offered for sale except as a
Toledo knocker", as hereinabove set forth.

HERMAN C. SINGER.

Subscribed and sworn to before me this 14th day of January,
. D. 1922.

[SEAL.]

I. C. MORTIMER,
Notary Public.

109 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

Affidavit of Ira Chase Koehne in Support of Motion for Preliminary Injunction.

STATE OF OHIO,
Lucas County, ss:

Ira Chase Kaehne, being first duly sworn upon his oath, says that he is fifty years of age and is a resident of the City of Indianapolis, Indiana; that he is now engaged in the practice of law in said city and was first admitted to the bar of any court April 25, 1921.

Affiant is an inventor and prior to April, 1895, had invented and applied for patents upon certain improvements in spring scales. In the month of April, 1895, affiant entered into a contract with the Computing Scale Company, the defendant in the above entitled action, by which contract affiant was to and did enter into the em-

ploy of said defendant for the purpose of developing the spring scales invented by affiant, the manufacturing rights to which were assigned by affiant to said defendant. Affiant remained in the employ of the defendant under said contract for about a year and then entered upon a different relationship with the said defendant The Computing Scale Company by which he received compensation upon an annual basis and devoted to the interests of that company such portion of his time as it required.

Affiant's relationship thus entered into continued in effect until about the spring of 1902 and during the period from about 1896 until about the spring of 1902 affiant devoted practically all of his time to the service of said defendant company. Affiant's duties during said period were in connection with the development
110 of patented devices and as time went on affiant's duties increasingly became broader and his responsibilities in connection with the efforts of the defendant company to become supreme in the computing scale business increased.

O. O. Ozias during all of said period was an officer and general manager of said The Computing Scale Company and was affiant's immediate superior in the work in which affiant was engaged, and affiant was during said period in practically daily conference with said O. O. Ozias. During said period Edward Canby and Charles James were also officers of said The Company Scale Company and said Canby and said Ozias were directors.

During said period one Joseph Hopkinson was assistant superintendent and then superintendent of the factory of The Computing Scale Company. One George Ludlow was in the employ of said defendant also and in charge of its sales activities in certain portions of its territory, and after the Moneyweight Scale Company was formed said Ludlow became its Vice-President.

At the time affiant first became connected with said defendant The Computing Scale Company said company was engaged in an effort to obtain a monopoly of the business of manufacturing and selling computing scales of all types. Said O. O. Ozias was the person who was in charge and who, up to the time of his death in about 1911, remained in charge of the campaign of The Computing Scale Company to that end.

After affiant had been with The Computing Scale Company about a year he became Mr. Ozias's chief assistant in the activities of said The Computing Scale Company in the effort to monopolize said business, and affiant continued in that capacity, becoming increasingly more active and in closer touch with the activities of the company in said matters up to the spring of 1902. From the spring of 1902 on, for at least three years, affiant continued to receive an annual retainer from said The Computing Scale Company for which he was obligated to and did render it services in consultation, with respect to the same matters which had been under his charge as the assistant of said Ozias during the former period above mentioned. After the expiration of said period during which affiant received said annual retainer he from time to time for several years rendered serv-
111 ices upon request of said The Computing Scale Company, affiant's office being and remaining up to the year 1918 in

Dayton, Ohio. Throughout all the period during which affiant was under employment or under retainer, or was receiving occasional employment from said The Computing Scale Company, as hereinbefore set forth, affiant was under agreement to said company that he would not disclose while so employed its activities in the matter of monopolizing the said business, or disclose to others knowledge which he might have with respect to the validity or invalidity, or of facts affecting same, of patents owned or controlled by said The Computing Scale Company. During all of said period affiant kept all of such matters to himself in accordance with such agreement and did not disclose to The Toledo Scale Company or to anyone connected with it any of the facts in this affidavit set forth, and would not have made such disclosure to anyone not connected with The Computing Scale Company had request been made to him to disclose any of said facts. Affiant did not disclose any of said facts to the Toledo Scale Company or anyone connected with it or to anyone else not connected with The Computing Scale Company until January 13, 1922.

Affiant is not now in the employ of The Computing Scale Company and has no relationship of any kind with it, and is at liberty to state the facts hereinafter set forth.

In the course of his employment with the defendant The Computing Scale Company affiant became familiar with scales which were manufactured by a company known as the Boston Computing Scale Company under patent Reissue No. 11536 obtained by Albert U. Smith, and affiant also became familiar with a patent granted to one William H. Phinney August 30, 1870, being United States Patent No. 106,869.

It was desired by The Computing Scale Company, in pursuance of its purpose to monopolize the computing scale business, to acquire from the Boston Computing Scale Company, its rights under Reissue Letters Patent No. 11536, and to acquire the business of the Boston company as well. Said Ozias was in charge for the Computing Scale Company of the matter of acquiring said business and said patent from said Boston company, and affiant as the assistant of said Ozias was in frequent consultation with Ozias with respect to said matters and was kept fully advised by said Ozias of what was done in said matter, and Ozias and affiant were in frequent consultation as to
the means to be employed to acquire the said patent and
112 business of the Boston company at the most advantageous price and terms.

Said Ozias had the same knowledge with respect to the Phinney patent No. 106,869 as was possessed by affiant, and prior to the purchase by The Computing Scale Company of the Boston company's patent and business, said Ozias informed affiant of the fact that said Phinney had manufactured and sold scales under the said Phinney patent, and that said scales so manufactured and sold had indicating cylinders of very light skeleton construction covered with very light material, usually paper. Said Ozias at about the time he made said statement to affiant caused one or more of said old Phinney scales to be purchased and shipped to the plant of The Comput-

ing Scale Company at Dayton, and thereupon upon examining same affiant, basing his opinion upon his knowledge of the scale business and his examination of said scale and experience with patents and his mechanical knowledge and experience, reached the conclusion that inasmuch as said Phinney scale had been manufactured, sold and used more than two years prior to the application for the original Smith patent that said Smith patent had been completely anticipated by such manufacture, sale and use of said Phinney scale, and that the manufacture of a computing scale using the cylinder of the kind above described, used by said Phinney, was free and open to the world and in no wise restricted by the claims under said Reissue Patent No. 11536 then owned by said Boston company, and affiant so advised said Ozias and said Ozias informed affiant that he had reached the same conclusion by his own independent investigation and consideration of said patents and of said manufactured scales. It was thereupon decided in conference between said Ozias and affiant that it would be in the interests of The Computing Scale Company to manufacture a computing Scale using a light weight indicating cylinder such as that manufactured by said Phinney and putting same out for what was known to said The Computing Scale Company and commonly termed as a "knocker", that is a scale designed for the purpose of eliminating a competitor, and that such scale should be so manufactured for the purpose of eliminating the competition of said Boston Company.

Before this plan was put into operation, however, it was decided by said Ozias, as affiant recalls, upon affiant's suggestion that an effort should first be made to see whether the patent and busi-
113 ness of the Boston company could be acquired at a lower price than the amount of expense which would be involved in engaging in the manufacture of said light weight cylinder scale by The Computing Scale Company, including the expense necessary to a campaign to suppress the competition of the Boston company.

Said Ozias was in charge of the matter of the negotiations for the purchase of the patent and business of the Boston company and discussed with affiant the best method of handling said matter before said negotiations were undertaken, and it was concluded by said Ozias and affiant that in such negotiations said Ozias should take the position that the Smith patent No. 11536 was invalid because of the anticipation thereof by the manufacture, sale and use of the Phinney scales hereinbefore described, and said Ozias, while said negotiations were in progress and afterwards, stated to affiant that he had used said argument in said negotiations and by means thereof had succeeded in acquiring the Reissued Patent No. 11536 and the business of the Boston Scale Company at a very much lower figure than the original asking price.

After The Computing Scale Company had acquired said Reissue Patent No. 11536 and the business of said Boston Company it began the manufacture of Computing Scales using a light weight skeleton indicating cylinder covered with paper, claiming to manufacture same under said Reissue Patent No. 11536, and in order to support its claim that it had the exclusive right by virtue of said Reissue

Patent No. 11536 to manufacture that type of computing scale The Computing Scale Company instituted a search for scales manufactured by Phinney under his patent No. 106869. Said effort to find and acquire said Phinney scales extended over a number of months and resulted in quite a number of said scales being acquired by The Computing Scale Company, and said Ozias and affiant were of the opinion that all which could be found by The Computing Scale Company had been found and acquired.

To the best of affiant's recollection it was several years after The Computing Scale Company had acquired the said patent and business from the Boston Company that computing scales of a similar type were put upon the market by two other concerns, one the Automatic Scale Company, one of whose sales agents was the Federal
114 Scale Company, and by Landers, Frary and Clark, one of whose sales agents was one R. T. Randall. Suits were brought in the year 1901 by the Computing Scale Company against said Federal Scale Company and against said Randall, alleging that the scales which they were selling were infringements of said Smith Reissue Patent No. 11536. The filing of said suits was directed by said O. O. Ozias and said suits were begun in the United States Circuit Court for the Eastern District of Pennsylvania. The counsel for the Computing Scale Company in said case were Church and Church of Washington, D. C. Neither said O. O. Ozias nor affiant, nor to affiant's knowledge, anyone else connected with the Computing Scale Company, informed said Church and Church or anyone connected with said firm of the fact that scales had been manufactured and sold by said Phinney and put in use many years before the Smith application had been filed, or that any of said Phinney scales embodying said light weight cylinder had been purchased by the Computing Scale Company. Said suits were brought by Church and Church in good faith and in ignorance of the fact that the claim asserted by them in behalf of the Computing Scale Company to the effect that said light weight skeleton cylinder covered with light weight material had been first invented by said Smith was untrue, although said Canby, the president of the Computing Scale Company and said Ozias and other officers and directors of said company knew at the time said suits were filed that said allegation was not true.

Said Ozias informed affiant some months after the filing of said suit against said Federal Scale Company in the Eastern District of Pennsylvania that the defendant therein had taken testimony showing the prior manufacture and use of the Phinney scale and introduced in evidence three of said Phinney scales embodying said light weight cylinder that had been in use many years before the Smith application had been filed, and Ozias further informed affiant that he had been advised by Church and Church, counsel in said case for the Computing Scale Company that in their opinion said evidence constituted a complete defense as to the claims asserted by the Computing Scale Company based upon the Smith reissue patent No. 11536 especially with respect to the claims therein based upon a light weight cylinder covered with light weight material. Said Ozias at said time informed affiant that it had been decided not to press said cases in

Philadelphia against the Federal Scale Company and said
115 Randall to trial because of said evidence which the defendant the Federal Scale Company had obtained.

After said conversations between Ozias and affiant, said Ozias informed affiant that he, the said Ozias was having a renewed search made for Phinney scales for the purpose of finding all of those which had not been found in the earlier search or produced by the Federal Scale Company, and as a result of said renewed search some additional Phinney scales were found and purchased by said the Computing Scale Company to affiant's knowledge. Affiant and said Ozias then believed that all of said scales which had been sold by said Phinney had been found and acquired either by the Computing Scale Company or were in evidence in said Federal Scale Company case.

Said Ozias stated to affiant at one time after said renewed search for said Phinney scales had been made that he believed that by keeping Church and Church on retainer for the Computing Scale Company so that their knowledge of the Phinney scales would not be available to others, and by employing other counsel to bring additional suits that might be necessary that the position of the Company with respect to the validity of the Smith reissue patent No. 11536 might from that time on be maintained by litigation. Church and Church were in fact thereafter employed upon regular retainer by said Computing Scale Company upon other matters but were in no case asked to assert the validity of Smith reissue patent No. 11536.

About the year 1906 the Toledo Scale Company engaged in the manufacture of cylinder scales having a light weight indicating cylinder substantially the same as those manufactured under the Smith reissue patent No. 11536 and under said Phinney patent No. 100869. Shortly after the Toledo Company engaged in the manufacture of said scale suit was brought by the Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Northern District of Ohio, Western Division based on Smith reissue patent No. 11536. Said suit was filed in the year 1907. In said suit the counsel for the Computing Scale Company were Messrs. Staley and Bowman of Springfield, Ohio. Said Ozias consulted affiant with reference to the choice of counsel to represent the Computing Scale Company in said suit in the Northern District of Ohio against the Toledo Scale Company, and said Ozias stated
116 to affiant in substance prior to the beginning of said suit that the Computing Scale Company had not and would not disclose to said Statey and Bowman the facts with reference to search for and purchase and secreting of the Phinney scales by said The Computing Scale Company.

Affiant does not recall the exact date of the death of O. O. Ozias, but does recall that it was after the suit had been begun by the Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Eastern Division of the Northern District of Illinois, and shortly before his death said Ozias stated to affiant in substance that he thought they, meaning the Computing

Scale Company had now succeeded in gathering up all of the old Phinney scales, that they had made a renewed search for them before filing the suit in Chicago, that they thought they had found them all before, that now he thought all of the scales were out of the way and it was safe to go ahead with the litigation to maintain the validity and infringement of the Smith Reissue Patent.

Affiant says that at the time the suit of The Computing Scale Company was begun in the Eastern Division of the Northern District of Illinois, and at the time testimony in behalf of The Computing Scale Company was taken therein, Edward Canby, the then President of The Computing Scale Company, O. O. Ozias, the then Vice-President and General Manager of The Computing Scale Company, and Joseph Hopkinson, the then Superintendent or Assistant Superintendent of the Dayton plant of The Computing Scale Company, to affiant's personal knowledge, each knew of the fact that scales had been manufactured by said Phinney with light-weight indicating cylinders of skeleton construction covered with paper more than two years before the Smith original application was filed in the United States Patent Office, and that said Phinney scales had been more than two years prior to the filing of said Smith original application sold and used by a number of users; and each of said officers and persons connected with The Computing Scale Company at the times above mentioned, to affiant's personal knowledge, knew of the fact that The Computing Scale Company had purchased or caused to be purchased all of said Phinney scales which it could find, other than those which were exhibits in said Federal Scale suit, and each of said officers and persons connected with said The Computing Scale Company
117 at the times above mentioned knew that said The Computing Scale Company had had in its factory at Dayton, prior to the time said suit was filed in the Eastern Division of the Northern District of Illinois against The Toledo Scale Company a number of said Phinney scales which had been purchased from users thereof, in which said scales said light-weight indicating cylinders covered with paper were used.

Affiant further says that he knows of his own knowledge that the purpose of the Officers and Directors of The Computing Scale Company in purchasing or causing the purchase of all of the Phinney scales which it could find as hereinbefore set forth was to suppress the same and to deprive persons sued for infringement of the Smith reissue patent No. 11536, including The Toledo Scale Company, of all opportunity to prove that by the manufacture and use of the Phinney scales said Smith patent had been anticipated and was invalid, and that said Edward Conby, O. O. Ozias and Charles James to affiant's knowledge were familiar with said purposes and designs, and affiant was informed by said O. O. Ozias that George Ludlow and Samuel M. Hastings were also familiar therewith.

Affiant to the best of his recollection did not personally buy any of the Phinney scales, but the salesmen of the Computing Scale Company who were in the territory where the Phinney scales had been sold, which was a somewhat restricted territory in the New England states, were instructed to be on the watch for said scales at all times

during the periods when the search therefor was on, and were under instructions to offer the owners of such scales exceptionally good terms and inducements therefor, and said salesmen on their part were given extra compensation for locating and purchasing such scales and reporting those, if any, which they located but were unable to purchase.

Affiant saw the scale hereinbefore mentioned which was acquired by The Computing Scale Company prior to its purchasing of the patent and business of The Boston Computing Scale Company and which had been sold by said Phinney, and to his knowledge that The Computing Scale Company had in its plant at Dayton for many years one or more of the said Phinney scales which were as hereinbefore stated complete anticipations of the light weight cylinder feature of the Smith reissued patent Number 11536.

Affiant is not able to state whether the defendant Company
118 still had any of said Phinney scales remaining in its possession after a fire which destroyed the plant of the Computing Scale Company about the year 1909.

As hereinbefore stated affiant is engaged in the practice of law at Indianapolis, Indiana, and is not now in the employ of the plaintiff, the Toledo Scale Company, or of the defendant, The Computing Scale Company, and has no interest of any kind whatsoever in the above entitled case.

Further affiant saith not.

IRA C. KOEHNE.

Sworn to before me and subscribed in my presence this — day of January, 1922.

____ ____,
Notary Public, Lucas County, Ohio.

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

Affidavit of Border Bowman in Support of Motion for Preliminary Injunction.

STATE OF OHIO,
County of Clark, ss:

Border Bowman, being first duly sworn, upon his oath says that he is an attorney-at-law and is and has been since 1898 a member of the firm of Staley & Bowman, which firm has been since said year engaged in the practice of law with offices at Springfield, Ohio. That said firm represented The Computing Scale Company of Dayton as its counsel in certain matters, from about the year 1900 up

to and until some time in the year 1910 or 1911, and repre-
119 sented said company as its patent counsel in a number of matters during said period.

Affiant has known Ira C. Koehne for many years and knows that said Koehne acted for The Computing Scale Company in patent matters, and that he was for a number of years the right-hand man of O. O. Ozias, General Manager of said The Computing Scale Company in patent matters. Said Koehne, to affiant's knowledge, was intimately associated with said The Computing Scale Company and knew and was in position to know its private affairs in reference to patents and patent litigation; and said Koehne came into frequent contact with affiant's partner, Paul A. Staley, but not with affiant, during said period.

Affiant and his partner, Paul A. Staley, prepared the bill of complaint in the case brought by said The Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Northern District of Ohio, Western Division in the year 1907, based upon the Smith Reissue patent No. 11536, covering certain alleged improvements in computing scales. Neither O. O. Ozias, Edward Canby, George Ludlow or Ira C. Koehne, nor any other person connected with said The Computing Scale Company, informed affiant or, to affiant's knowledge, any person connected with the firm of Staley & Bowman, that a stipulation had been entered into whereby certain scales manufactured by one Phinney, which were in evidence in certain suits brought by The Computing Scale Company on said Smith Reissue Patent No. 11536 in the United States Circuit Court for the Eastern District of Pennsylvania and certain depositions referring to said scales taken in said suits were kept off the record; and that none of said persons informed affiant or, to his knowledge, any person connected with the firm of Staley & Bowman, that said "Exhibit Scales" so manufactured by said Phinney were at any time in the possession of any counsel for The Computing Scale Company; and none of said persons informed affiant, or, to his knowledge, any person connected with the firm of Staley & Bowman that said The Computing Scale Company had purchased or in any manner acquired any scales embodying cylinders of the type aforesaid manufactured by the said Phinney or any one else; and that affiant and, to his knowledge, no person connected with the firm of Staley & Bowman had any knowledge at any time that said The Computing Scale Company had in its possession at any time
120 any such scales manufactured by said Phinney with an indicating cylinder of the character above mentioned.

Affiant further says that neither he nor, to his knowledge, any person connected with said firm of Staley & Bowman at any time had any knowledge or information of any search made by The Computing Scale Company for Phinney scales, or of any attempt upon the part of said The Computing Scale Company or any of its officers or representatives to suppress any evidence with respect to the prior manufacture of scales embodying cylinders of the type described in Smith Reissue Patent No. 11536.

Affiant was not instructed by The Computing Scale Company to

bring to trial the suit against the Toledo Scale Company in the Northern District of Ohio, Western Division, above mentioned.

Affiant, beginning in the year 1910, made a number of visits to the factory of The Computing Scale Company at Dayton, Ohio, with reference to the case involving the De Vilbiss patent, and at no time was he shown any Phinney scales, or any scales made by any other company embodying a light-weight skeleton cylinder covered with paper or other light material.

Affiant further says that neither he nor any one connected with the firm of Staley & Bowman had any part in the filing or prosecution of the suit brought by The Computing Scale Company in the United States Circuit Court for the Eastern Division of the Northern District of Illinois against the Toledo Scale Company, involving said Smith Reissue Patent No. 11536.

Affiant further says that he learned from Mr. O. O. Ozias that Messrs. Church & Church had brought a suit for The Computing Scale Company upon the Smith Reissue Patent No. 11536, and on November 5, 1906 affiant wrote a letter to Messrs. Church & Church, of which a copy is hereto attached and made a part hereof, marked "Exhibit A," and that affiant a few days later received a reply to said letter from Church & Church under date of November 8, 1906, a true copy of which is hereto attached, marked "Exhibit B."

Affiant further says that his partner Paul A. Staley was undoubtedly the one in closest touch with The Computing Scale Company at or about the time the suit was brought by The Computing Scale Company against the Toledo Scale Company on the Smith
121 Reissue Patent No. 11536 in the Ohio District.

Further affiant saith not.

BORDER BOWMAN.

Sworn to before me and subscribed in my presence, this 24th day of January, 1922.

CHAS. I. WELCH,
Notary Public, Clark County, Ohio.

Copy.

EXHIBIT A.

Nov. 5, 1906.

Messrs. Church & Church,
Washington, D. C.

GENTLEMEN:

We have had occasion to go over with Mr. Ozias the Smith patent, reissue number 11536, relating to drum computing scale, and Mr. Ozias advises us that you have brought suit under this patent and that the defendants have taken their testimony in this case. Can you furnish us a copy of the answer in the suit, and also advise us what you think are the probabilities of sustaining the claims 5, 6 and 7 on the construction of the drum? Or, in other words, what

re the best references that have been found by the defendants to aid claim?

Very truly yours,

STALEY & BOWMAN.

PAS—g.

Copy.

EXHIBIT B.

Nov. 8, 1906.

Messrs. Staley & Bowman,
Springfield, Ohio.

GENTLEMEN:

Your favor of the 5th inst. received.

The Smith reissue patent No. 11536 is in suit in a case which is now rather dormant. The defendant put up a very vigorous defense indeed and we think the outcome of the suit is doubtful. In the answer the following patents are set up against this re-issue:

G. W. Thompson, 78,552, June 2, 1868.
V. H. Phinney 106,869 Aug. 30, 1870.
C. S. Lewis 228,261 June 1, 1880.
G. H. Harris 552,408 Nov. 9, 1886.
C. M. Babcock 521,805 Feb. 18, 1890.
L. F. Kepler 514,475 Feb. 13, 1894.
E. W. Wise 532,129 Jan. 8, 1895.
J. H. Swihart 539,599 May 21, 1895.
S. E. Root 210,806 Dec. 10, '78.
E. & G. A. Waters 315,095 Apr. 7, '85.
J. Scott 398,002 Feb. 19, '89.

English Patents.

G. F. Skipworth, No. 884 of 1838.
E. W. Wise, No. 678 of 1895.

The defendants' expert in his testimony referred to the two English patents, and U. S. patents to Thompson, Phinney, Lewis, Harris, Kepler and a patent to Ide No. 272,699. The defendants also set up the prior use of the invention by the following parties at the places named:

William H. Phinney at Pawtucket, R. I.
Daniel M. Horton at Pawtucket, R. I.
John H. Delvin at Pawtucket, R. I.
Wm. M. Raymond at Attleboro, Mass.
Patrick Tierney at Pawtucket, R. I.
Thomas Z. Phinney at Pawtucket, R. I.
Arnold Moffett Jr. at Lonsdale, R. I.
Charles F. Smith at New Britain, Conn.
Landers, Frary & Clark (Corp.) at New Britain, Conn.

Hubbard & McGlary at Windsor, Vermont.
Andrew Turnbull, at New Britain, Conn.
William F. Seward at New Britain, Conn.
Rodolphus L. Webb, at New Britain, Conn.
Samuel R. Munson at New Britain, Conn.

Testimony was taken showing the public use of the Phinney in vention but the drum of the Phinney scale seems to have been mad invariably of a rather heavy material. The drum itself was mad up of veneer or card board and the graduated chart was paste thereon. The defense is rather a dangerous one.

Yours very truly,

CHURCH & CHURCH.

123 In the District Court of the United States for the Northe District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE CO. et al., Defendant-.

Affidavit of Paul A. Staley in Supprt of Motion for Preliminar Injunction.

STATE OF OHIO,
County of Clark, ss:

Paul A. Staley, being duly sworn says that he is a member of th firm of Staley & Bowman, attorneys of Springfield, Ohio, giving special attention to patent matters, that the said firm represented th Dayton Computing Scale Company of Dayton, Ohio as its counse in certain matters from about the year 1900 up to the time of it consolidation with other concerns under the name of The Comput ing Scale Company of America; that affiant participated actively i the organization of the Computing Scale Company of Americ which was a consolidation of The Dayton Computing Scale Com pany, Dayton, Ohio, Moneyweight Scale Company of Chicago Stimpson Computing Scale Company of Detroit, The Computin Scale Company of Canada, and others which consolidation wa effected about the year 1906 and subsequently his firm represente the Computing Scale Company of America until 1910 or 1911.

In 1901 affiant was approached by Mr. Theobald who had pur chased The Toledo Scale & Cash Register Company and desired Staley & Bowman to represent them in certain patent matters par ticularly in connection with their cash register business and in some of his conversations the subject of selling the scale patents to the Dayton Computing Company was mentioned and affiant stated that upon Mr. Theobald's request he would be very glad to conduct negotiations for their sale to the Dayton Company, but nothing was done to this end to affiant's knowledge.

124 Affiant knows Ira C. Koehne and knows that he represented the Dayton Company in patent matters and affiant had frequent conferences with him and knows that he was intimately connected with the Dayton Company and knew much of its private affairs relating to patents and patent litigation.

Affiant further states that his firm of Staley & Bowman filed a bill against the Toledo Computing Scale Company under the Smith reissue patent No. 11536; that this suit was not pressed and was finally dismissed, as affiant remembers, upon orders received from the general counsel of the Computing Scale Company of America in Chicago. Affiant at present has no recollection that he was ever informed by any officer or other persons representing the Dayton Computing Scale Company or the Computing Scale Company of America concerning scales which had been manufactured and known as the Phinney scales or that any depositions concerning their use had been filed in previous suits. Affiant further states that he made numerous visits to the factory of the Dayton Computing Scales Company or of the Computing Scales Company of America located at Dayton between the years 1907 and 1911 and he has at this present time no recollection of having seen any finished Phinney scales at the factory and does not at the present time recall that the manufacture of scales under the Phinney patent was discussed.

Affiant might state that he personally did not have a great deal of confidence in the Smith reissue patent in view of what he regarded as the attitude of the Federal Courts toward patents with a narrow margin of invention, which attitude seems to have been somewhat changed in recent years.

(Signed) PAUL A. STALEY.

Subscribed and sworn to before me this 17th day of January, 1922.

[SEAL.] (Signed) CHAS. I. WELCH,
Notary Public.

125 In the District Court of the United States, Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

Affidavit of Edward Rector.

STATE OF ILLINOIS,
County of Cook, ss:

Edward Rector, being first duly sworn deposes, and says as follows:

I am a member of the law firm of Rector, Hibben, Davis & Macauley of Chicago, and have been engaged in the practice of law,

specializing in patent matters, for many years. The members of my firm were solicitors for the Toledo Computing Scale Company (later Toledo Scale Company) in cause No. 30024 in the United States Circuit Court for the Northern District of Illinois, Eastern Division, entitled "The Computing Scale Company vs. Toledo Computing Scale Company," and I am familiar with the proceedings therein.

I have read the answer of defendant, The Computing Scale Company, in the above entitled cause and the affidavits of Thomas F. Sheridan and Walter A. Scott filed in connection therewith. There are a number of allegations in said answer that are not in accord with the facts, and others which are calculated to give a mistaken impression of the facts if not explained. I shall briefly refer to a number of them.

1. The quoted extracts from defendant's answer in said cause No. 30024 appearing on page 3 of defendant's answer in present cause are incomplete, as will be seen by reference to the printed copy of said answer at pages 14, 22 and 23 of Volume 1 of the printed record before this court. As there shown the allegations contained in all three of the pargraphs were made "on information and belief," in addition to which a comparison of the last two quoted paragraphs with paragraphs XXIV, XXII of said printed answer will
126 show that they are further incomplete, and that in the original answer a number of patents in addition to the Phinney and Babcock patents were set up (in paragraph XXIV) and that the alleged prior uses set up — paragraph XXII corresponded to such patents. This was in accordance with the conventional practice in the pleadings in patent cases to allege, on information and belief, prior use by each of the inventors whose patents are set up as prior patents, and had no other significance in the present case.

2. The statements in sub-paragraph (*b*) of paragraph 5 of said answer to the effect that in said cause No. 30024

"it appeared from the testimony of the Toledo Computing Scale Company's expert witness, John W. Culver, that the said Phinney scale was not an operable scale, and the said Toledo Computing Scale Company voluntarily chose not to investigate nor to introduce evidence to support its allegation of prior public use and sale"

are not correct. Mr. Culver did not testify that he had ever seen a Phinney scale, or that he had knowledge that any Phinney scales had ever been built. On the contrary his testimony affirmatively shows that he had no knowledge of any such scales. What he testified to was that he built an experimental scale, partly following and partly departing from the Phinney patent, and that it was not successful. His testimony on this point will be found at page 109 of the Printed Record, (Ans. 52-57).

With regard to the allegation above quoted to the effect that "the said Toledo Computing Scale Company voluntarily chose not to investigate nor to introduce evidence to support its allegations of prior public use and sale of Phinney scales, the record in said cause shows

thing of the kind, and it was not the fact. The testimony of de-
ndant's witness John D. Burkeholder in said cause, referred to in
id answer as supporting such allegation, was simply to the effect
at he, Burkeholder, had not personally made "any investigation
find out wht had been done along the line of the Phinney patent."
rinted Record, page 317, Answers 27-28.) Mr. Burkeholder was
e successor to Mr. Allen De Vilbiss as the head of the Patent De-
rtment of the defendant company at Toledo, Mr. DeVilbiss having
ed early in the year 1911. The investigation of the Phinney
ales had been made by Mr. DeVilbiss before his death, and Mr.
Burkeholder's personal work was particularly directed to the
27 investigation of the other scales referred to in his direct ex-
amination (pp. 311-314) and in other parts of his cross-ex-
mination (pp. 314-319). Defendant and its counsel believed that
e matter of the Phinney scales had been thoroughly investigated
Mr. De Vilbiss before his death, without result.

The further statement in said sub-paragraph of said answer, to the
fect that the defendant "voluntarily elected not to investigate the
hinney scales" is, like the preceding statement, not in accord with
e facts. The defendant and its counsel never elected to do any-
ing of the kind, but believed that an investigation had been made
Mr. De Vilbiss as the head of defendant's Patent Department.

3. The statements contained in sub-paragraph (*d*) of paragraph
of sa' l answer to the effect that after an appeal had been taken in
id cause No. 30024,

"The said Toledo Computing Scale Company entered upon an
vestigation in regard to the said Phinney scales and discovered
e facts which it claims to have discovered and now relies upon in
gard to the said Phinney scale and the alleged acts of this De-
ndant with regard thereto"

e not correct. The Toledo Computing Scale Company did not,
ter said appeal "enter upon an investigation in regard to the said
hinney scale" in the sense sought to be conveyed by this allegation
defendant's answer, but learned of the Phinney scales from an
torney who was defending another suit brought by plaintiff on the
me patent at Detroit. The facts in this regard are set forth in the
fidavit of Mr. Davis and Mr. Pagelsen at pages 970-975 of the
inted Record. After learning from Mr. Pagelsen that there had
en some Phinney scales manufactured by the patentee, Phinney,
me forty years before, Mr. Davis did then make a trip to Rhode
land to investigate the matter further, as set forth in his affidavit,
t until receiving the information from Mr. Pagelsen in the man-
r set forth neither Mr. Davis nor any other of defendant's counsel
d any knowledge of the Phinney scales; and even when Mr. Davis
nt to Rhode Island and made a thorough investigation he was not
le to find any of them still in use.

Moreover, even the investigation made at that time did not develop
the facts now relied on by plaintiff in the present cause to
28 show the suppression of evidence by the defendant in the
present cause, since it was not discovered or learned at that

time, nor until very recently, that the defendant in the present cause had bought up all of the old Phinney scales that were in use, after it had learned of their existence in connection with its suit at Philadelphia, where a number of them had been introduced in evidence some ten years prior to the date at which the plaintiff in the present case acquired any knowledge of them.

4. The further statements in said sub-paragraph (*d*) of paragraph 5 of said answer, to the effect that in support of defendant's motion for leave to dismiss so much of its appeal in said cause No. 30024 as related to reissued patent No. 11536 defendant "in support thereof filed affidavits of newly discovered evidence which are substantially the affidavits filed upon the motion in said Circuit Court of Appeals by the Toledo Computing Scale Company next hereinafter stated," (referring to the motion and affidavit set forth in sub-paragraph (*f*) following said sub-paragraph (*d*), and that "on the hearing of said motion the said Toledo Computing Scale Company presented to the said Circuit Court of Appeals three scales which it claimed to have been made and used under the said Phinney patent more than two years prior to the original application for said patent to Albert U. Smith," are not correct. I had personal charge of the motions in question and personally presented them to the Court of Appeals, the first one on January 21, 1913 and the second on May 14, 1913. There were no affidavits filed in support of the first motion, and a number of the affidavits filed in support of the second motion had not been secured at the time the first motion was presented on January 21, 1913, as will be evidenced by the dates of execution of such affidavits appearing at pages 975, 979 and 981 of the Printed Record. Nor did defendant present to the Court of Appeals in connection with said motion "three scales which it claimed to have been made and used under the said Phinney patent more than two years prior to the original application for said patent to Albert U. Smith." I do not believe any samples of Phinney scales were presented or exhibited to the court in connection with said first motion, as it was merely a motion for leave to dismiss one branch of defendant's appeal, and I am certain that three samples of Phinney scales were not presented or exhibited to the court because defendant at that time had possession and knowledge of but one single sample of the old Phinney
129 scales (and a detached indicating drum in addition) which defendant's counsel had borrowed from Mr. Pagelsen, counsel for the defendant in the Detroit suit above referred to. Mr. Davis had been unable to secure any other samples of Phinney scales during his investigation in Rhode Island, as set forth in his affidavit, and had been obliged to ask Mr. Pagelsen to send his single sample to Rhode Island for use and identification in connection with the affidavits which Mr. Davis secured there and which are found in the Printed Record. Nor did defendant have any additional samples of Phinney scales at the time the second motion (which was in fact a printed petition) was presented to the Court of Appeals on May 14, 1913, as set forth in sub-paragraph (*f*) of paragraph 5 of the said answer. The additional samples of Phinney scales which were introduced in evidence in connection with the

depositions taken six or seven years later, in connection with the accounting proceedings and found at pages 1297 to 1419 of Volume 3 of the Printed Record, were subsequently discovered during the intervening years.

5. There was no opinion filed by the Court of Appeals in denying defendant's motion in said case No. 30,024 to dismiss so much of its appeal as related to the reissued patent in suit, and I have no recollection whatever of the presiding Judge of the court making any such remarks, in the disposition of the motion, as those attributed to him by Mr. Scott in his affidavit, and as set forth in the said answer as the "opinion" of the court. If any such remarks were made, at any time, I am inclined to think it was on the occasion of the denial of the subsequent motion or petition, presented on May 14, 1913. The first motion, on January 21, 1913, was merely a motion for leave to dismiss one branch of defendant's appeal, and it was not denied, as I recall the occasion, because of alleged lack of diligence on the part of defendant discovering evidence of the Phinney scales, but because the court was not inclined to permit defendant to dismiss part of its appeal without dismissing its entire appeal. The defendant had been enjoined by the decree of the District Court under two patents, and had taken an appeal as to both. The reissued patent had expired prior to the motion to dismiss so much of the appeal as related to it, but the other patent had not expired, and if defendant had dismissed its entire appeal (which the Court of Appeals would no doubt have permitted) it would have been immediately subject to the injunction under the unexpired patent. Hence its motion for leave to
130 dismiss only so much of its appeal as related to the expired reissued patent, and the denial of its motion for the reason above stated. The motion was presented to the Court of Appeals immediately preceding the argument of the appeal on its merits, and occupied only a few minutes, and I am sure that if any affidavits were exhibited to the court (none were filed) they were not read to the court or taken into consideration.

Nor were the affidavits referred to in sub-paragraph (*f*) of paragraph 5 of said answer read to or by the court on the subsequent presentation, on May 14, 1913, of defendant's petition to the court to include in its mandate to the District Court permission to entertain and consider an application of the defendant for leave to introduce proofs respecting the Phinney scales. On the contrary, said petition was summarily denied by the presiding Judge of the court upon a mere statement by defendant's counsel of the facts set forth in the affidavits. The presentation of defendant's petition on this occasion, and its denial by the court, did not, as I recall it, consume more than ten or fifteen minutes, and the court did not examine the affidavits nor the sample of Phinney scale presented with them. As before stated, defendant had in its possession at this time only the single scale, and the detached indicating drum, which it had borrowed from Mr. Pagelsen, so that the statement of

the answer and affidavits to the effect that it presented three Phinney scales to the court on this occasion is a mistake.

6. The statement at the end of sub-paragraph (*h*) of paragraph 5 of the said answer to the effect that

"both said interlocutory decree of May 16, 1914, and said final decree of March 5, 1919 were rendered long after the alleged discovery of the alleged facts as to said Phinney scales and as to the suppression and secretion of evidence by plaintiff now relied upon in the bill of complaint in this case"

is not correct, nor are the further assertions in said paragraph and in sub-paragraph (*j*), to the effect that defendant's counsel in said cause No. 30,024 urged upon the Court of Appeals the same allegations of fraudulent suppression of evidence by plaintiff in said cause that are now relied on by plaintiff in the present cause. The allegations of wrongful conduct on the part of plaintiff in said cause No. 30,024, which were urged upon the court were allegations respecting the suppression and concealment of the plaintiff's
131 knowledge of the existence of the old Phinney scales and the evidence concerning them which was introduced into its suit at Philadelphia ten years before and because of which said suit was abandoned. Defendant's counsel had no knowledge at that time, nor at any time prior to the final disposition of said cause No. 30,024 by the Court of Appeals, that the plaintiff in that cause (defendant here) had bought up and concealed or destroyed all of the old Phinney scales which had been sold by Phinney and introduced into use and which could be located after the matter of the Phinney scales had been brought to plaintiff's attention by the evidence introduced in the Philadelphia case. As before stated, and as shown in his affidavit, Mr. Davis had been unable to locate a single Phinney scale anywhere in the district in which the Phinney scales had been sold at the time of his investigation in December 1912, but the reason for their disappearance was not known at that time, nor at any time until a date subsequent to the final disposition of said cause by the Court of Appeals. I submit herewith, as Exhibits A and B, copies of appellant's brief filed in the Court of Appeals, and its petition and brief filed before the Supreme Court on application for certiorari, which will show exactly what representations were made.

With respect to the further allegations of the said answer, contained in sub-paragraph- (*v*) and (*x*) of said paragraph 5, to the effect the secretion and suppression of evidence by the plaintiff in said cause No. 30,024 now relied upon by plaintiff in the present cause was well known to the present plaintiff on and prior to January 21, 1913, and the 14th day of May, 1913, and that the same were alleged to be shown by the affidavits filed in said Circuit Court of Appeals on said days last stated, the affidavits will of course speak for themselves, and are found at pages 968 to 996 of the Printed Record, an examination of them at which point will show that they contain no allegation or suggestion that the plaintiff in that

case had bought up and secreted or destroyed all of the old Phinney scales which it could find in use, and of course no such representation was made to the court by defendant's counsel.

7. With respect to the allegation contained in sub-paragraph (*m*) of said paragraph 5 of the said answer, to the effect that when the defendant in said cause No. 30,024 "did investigate said manufacture and use of Phinney scales (it) had no difficulty whatever in collecting its evidence alleged, and its exhibits of the alleged Phinney scales which *in* January 21, 1913 it presented to the Circuit Court of Appeals for the Seventh Circuit," the affidavits heretofore referred to, and found in the Printed Record, show that it did have great difficulty in collecting such evidence and exhibits, and that even after it had learned of the evidence from Mr. Pagelsen and made a thorough investigation it was unable to locate and secure a single sample of the old Phinney scales and had to base its petition to the Court of Appeals solely upon the one which was loaned to it for that purpose by Mr. Pagelsen.

8. I have been engaged in the active practice of patent law for thirty-five years past, and am familiar with the investigations of the prior art usually made in connection with the defense of infringement suits, and I have no hesitation in saying that the plaintiff in the present case (defendant in said cause No. 30,024 went to unusual trouble and expense, and exercised more than ordinary diligence, in its efforts to thoroughly develop the prior art relating to the invention of the reissued patent in suit. It so happened that, notwithstanding its efforts and its diligence, it failed to discover the old Phinney scales, and in view of the death of Mr. De Vilbiss, who was at the head of defendant's Patent Department at the time, and had entire charge of the investigation of the prior art, it may not be possible to show exactly why the old Phinney scales were not discovered, but the showing of the record (Printed Rec. Vol. I, pp. 63-124, 238-320) and particularly the testimony of Mr. Burkeholder (pp. 311-320) respecting the trips he made from the Atlantic to the Pacific, and to numerous intermediate points, in his investigation of the prior art on behalf of the defendant, and his efforts to establish the prior existence of computing scales having lightweight indicator drums, is entirely inconsistent with either a charge of lack of diligence on the part of the defendant or a charge that it had any knowledge of the Phinney scales. Manifestly, if it had acquired any knowledge of the Phinney scales as the result of the earlier investigations which Mr. De Vilbiss had made or was believed to have made, before his death, it would not have gone to the very great trouble and expense which it subsequently incurred in investigating the Milburne and Culmer and Kepler and Wise scales, all of which were very much more remote from the scale of the reissued patent in suit than were the later-discovered Phinney scales.

133 The defendant had, prior to the submission of said cause to the District Court, caused to be made what it and its counsel believed to be a thorough and exhaustive investigation of the

prior art in all parts of the country, and all of the evidence which it had secured respecting the same was submitted to the District Court on the original hearing. It was not until after the decree of the District Court had been entered, and an appeal therefrom to the Court of Appeals had been allowed and perfected, and the cause was pending in the Court of Appeals, that defendant acquired knowledge of the old Phinney scales, in the manner explained in the affidavits found in the printed record and heretofore referred to, whereupon it promptly applied to the Court of Appeals for relief. And even then it required no knowledge whatever of the facts now relied upon for relief in the instant case, and no representations respecting any such facts were ever at any time made to the Courts in said cause No. 30,024, as will appear from the briefs filed in said cause and heretofore referred to.

EDWARD RECTOR.

Subscribd and sworn to before me this 25th day of January, 1922.

[SEAL.] ROBERT DOBBERMAN,
Notary Public, Cook County, Illinois.

134 EXHIBIT IV.

In the District Court of the United States for the Northern District of Ohio, Western Division, October Term, A. D. 1921, to wit, January 19, 1922.

Present: Honorable John M. Killits, U. S. District Judge.

THE TOLEDO SCALE COMPANY, Complainant,

vs.

COMPUTING SCALE COMPANY et al., Defendants.

Order.

This cause coming on to be heard, pursuant to the former order of the court upon application of complainant for a temporary injunction, the complainant offered, as tending to support the averments of the complaint, the verified complaint, together with the several affidavits thereto attached and other affidavits as shown by the record, and further orally moved the court for permission to introduce additional testimony, to be taken in open court and by affidavit. Thereupon came the defendant and tendered for filing and filed its verified answer and three affidavits, and orally moved the court to dismiss this case for that it appears from the record that the issue thereof was res adjudicata.

The court finding itself in the midst of a protracted jury trial to which the United States is a party, and burdened with much other pending and uncompleted work, and finding no opportunity to presently consider either the said motion of the complainant for

leave to introduce further testimony, as aforesaid, or the said motion of the defendant to dismiss for the reason aforesaid, it is ordered that the temporary restraining order heretofore granted herein be and the same is continued in full force and effect for ten days or until, within that time, the court may find it possible to give attention to said several matters.

January 19, 1922.

JOHN M. KILLITS,
U. S. District Judge.

135 EXHIBIT V.

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Answer of Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company and Petition for Affirmative Relief.

Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company, being corporations organized and existing under the laws of the State of Maryland, file this, their answer to the bill of complaint of the Toledo Scale Company and the amendments thereto, and say:

1. They admit that the Toledo Scale Company is a corporation of the State of New Jersey and is a citizen and resident of said state; that the defendant, The Computing Scale Company, is a corporation of the State of Ohio and is a citizen and resident of said state and of the Southern Judicial District thereof; and that it has its principal office and place of business in the City of Dayton, Ohio.

They admit that the defendants, First National Bank of Toledo, Second National Bank of Toledo, and Northern National Bank of Toledo, are national banking associations, as alleged in the bill of complaint, and that said defendants are located in the City
136 of Toledo and for jurisdictional purposes are citizens of the State of Ohio and residents of the Northern District of Ohio, Western Division.

They admit that The Commerce Guardian Trust and Savings Bank is a corporation of the State of Ohio, that is has its principal place of business in the City of Toledo, and is a citizen of the State of Ohio and a resident of the Northern District of Ohio, Western Division.

They admit that the defendant, The Guardian Savings and Trust Company, is a corporation of the State of Ohio, that it has its principal place of business in the City of Cleveland, Ohio, and is a citizen and resident of the State of Ohio, and of the Northern District of Ohio, Eastern Division.

2. These defendants admit that the matter in controversy herein, exclusive of interest and costs, exceeds the sum of Five Thousand Dollars ($5,000.00).

3. They admit that the name of the Toledo Scale Company was formerly Toledo Scale and Cash Register Company and afterwards Toledo Computing Scale Company, and that the plaintiff, under its present and former names, has since July 12, 1901, been continuously engaged in the manufacture of computing scales, and that the defendant, The Computing Scale Company, has also been engaged in the manufacture of computing scales.

4. These defendants are without knowledge or information as to the matters and things set forth and alleged in paragraphs four to twenty-three, inclusive, of the bill of complaint, save and except the allegation that the defendant, The Computing Scale Company, as plaintiff, brought a suit against the Toledo Scale Company, as defendant, in the Circuit Court of the United States for the Northern District of Illinois, Western Division, in equity, being cause No. 30024, for the alleged infringement by said Toledo Scale Company of certain letters patent; and by reason of these defendants' lack of knowledge as to said matters and allegations, they leave the plaintiff to its proof.

5. These defendants admit that on or about March 5, 1919, the United States District Court for the Eastern Division of the Northern District of Illinois, entered a decree giving The Computing Scale Company a judgment against the Toledo Scale Company in the amount of $420,683.44, and that said judgment was af-
137 firmed on appeal by the United States Circuit Court of Appeals, for the Seventh Circuit, in an opinion filed October 4, 1921.

These defendants, being without information or knowledge as to the matters and things alleged in paragraph twenty-five of the bill of complaint, leave the plaintiff to its proof.

6. They admit that an application to the Supreme Court of the United States for a writ of certiorari to review the second decision of the Circuit Court of Appeals, for the Seventh Circuit, in the suit hereinbefore referred to, was denied by said United States Supreme Court.

7. They admit that after the entries of the aforesaid judgment against the Toledo Scale Company, the plaintiff gave and filed its supersedeas bond in favor of The Computing Scale Company, for the purpose of staying execution of said judgment, and that said bond was and is in the amount of Four Hundred Fifty Thousand

Dollars ($450,000.00) and was executed by the Toledo Scale Company as principal, and by these defendants as sureties.

They further admit that after the second opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, had been filed, the Toledo Scale Company moved said court for a stay of mandate, and thereupon said court ordered that the plaintiff file an additional bond in the sum of Fifty Thousand Dollars ($50,000.00) if it desired that said mandate be stayed until the further order of said court, and on November 2, 1921, in pursuance of said order, the Toledo Scale Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, duly executed a bond in the sum of Fifty Thousand Dollars ($50,000.00) in favor of The Computing Scale Company as further security for the payment to The Computing Scale Company of the amount of said judgment against the Toledo Scale Company.

8. They admit that by the terms of said bonds for Four Hundred Fifty Thousand Dollars ($450,000.00) and Fifty Thousand Dollars ($50,000.00), respectively, these defendants, as sureties on said Four Hundred Fifty Thousand Dollars ($450,000.00) bond, and the Fidelity and Deposit Company of Maryland, as said surety on said Fifty Thousand Dollars ($50,000.00) bond, are unconditionally obligated to pay The Computing Scale Company the amount of the judgment obtained by it against the Toledo Scale Company as soon as the mandate from the United States Circuit Court of Appeals to the District Court shall be issued, and
138 that said mandate will now be issued at once or in the very immediate future and these defendants will thereupon be called upon to and will, if not restrained by this court, pay to The Computing Scale Company the amount of said judgment and interest.

9. These defendants further admit that in order to obtain the execution of said bond for Four Hundred Fifty Thousand Dollars ($450,000.00), it was necessary for the Toledo Scale Company to execute its checks amounting to Four Hundred Fifty-five Thousand Dollars ($455,000.00), duly certified, and deliver the same to these defendants, and that said checks were drawn upon and certified by banks as follows:

First National Bank of Toledo, Toledo, Ohio.....	$50,000.00
Second National Bank of Toledo, Toledo, Ohio.....	75,000.00
Northern National Bank of Toledo, Toledo, Ohio....	55,000.00
National Bank of Commerce (now The Commerce Guardian Trust and Savings Bank), Toledo, Ohio..	75,000.00
The Guardian Trust and Savings Bank, Cleveland, Ohio	200,000.00

These defendants deposited said certified checks in said banks upon which they were drawn respectively, and received from said banks unconditional certificates of deposit, payable on demand, in favor of these defendants, and they now hold as indemnity uncon-

ditional certificates of deposit issued to them by said banks in the amounts and by the banks as aforesaid.

10. They admit that since said certificates of deposit were issued and delivered, interest has accumulated thereon amounting to about Twenty-five Thousand Dollars ($25,000.00), and that at the time Fidelity and Deposit Company of Maryland executed the second bond, above referred to, in the amount of Fifty Thousand Dollars ($50,000.00), it was agreed between the Toledo Scale Company and the Fidelity and Deposit Company of Maryland that the interest accrued and to accrue on said certificates of deposit should stand as security for the Fidelity and Deposit Company of Maryland against loss by reason of its execution of said Fifty Thousand Dollar ($50,000.00) bond.

11. They admit that the amount of the judgment held by The Computing Scale Company against the Toledo Scale Company, with interest to date, is in excess of Four Hundred Ninety Thou-
139 sand Dollars ($490,000.00), and that if the defendant, The Computing Scale Company, is permitted to collect the amount thereof from these defendants, or either of them, as the sureties on said bonds, these defendants, or the one making payment, or the one called upon to make payment, will at once be entitled to present for payment each of said certificates of deposit and to collect the principal and interest due thereon, and to apply the same in satisfaction of the amount paid on said judgment, or apply the same to the payment called for, and in such event said certificates of deposit will be presented at once to the banks aforesaid and demand will be made for the payment of said certificates forthwith, and that said banks will forthwith be obliged to pay the amount of said certificates of deposit to these defendants, or to the one making payment, and that in case these defendants, or either of them, is called upon or compelled to pay a greater amount than is received or collected from said banks, the Toledo Scale Company will be immediately compelled to pay the difference.

12. These defendants are without information or knowledge as to the loss which may fall upon the Toledo Scale Company in the event The Computing Scale Company is not enjoined and restrained from enforcing said judgment, but they are advised that said loss would be irreparable and that the plaintiff, Toledo Scale Company, would have no remedy at law.

13. These defendants, on information and belief, admit that there is imminent danger that the defendant, The Computing Scale Company, will take steps to enforce its said judgment against the Toledo Scale Company in the immediate future, either by way of levy upon property of the Toledo Scale Company or by enforcing payment of said bonds.

14. These defendants, being without information or knowledge as to the matters and allegations of said bill of complaint not herein expressly admitted to be true, leave the plaintiff to its proofs.

Further answering said bill of complaint, and by way of petition for affirmative relief against the Toledo Scale Company, The Computing Scale Company, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce Guardian Trust and Savings Bank, The Guardian Savings and Trust Company and The Summit Trust
140 Company, The Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company say:

1. Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company are corporations organized and existing under the laws of the State of Maryland and are citizens and residents of said state.

2. Toledo Scale Company is a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of said state.

The Computing Scale Company is a corporation of the State of Ohio, and is a citizen and resident of the Southern District of Ohio, and has its office and principal place of business in the City of Dayton.

First National Bank of Toledo, Second National Bank of Toledo and Northern National Bank of Toledo are national banking associations organized under the laws of the United States, and are residents of the City of Toledo, Ohio, and for the purposes of jurisdiction are citizens and residents of the State of Ohio.

The Summit Trust Company and The Commerce Guardian Trust and Savings Bank are corporations of the State of Ohio, and are citizens and residents of said state.

The defendant, The Guardian Savings and Trust Company is a corporation organized and existing under the laws of the State of Ohio and has its principal place of business in the City of Cleveland, Northern District of Ohio, Eastern Division, and is a citizen and resident of the State of Ohio and of said Northern District of Ohio, Eastern Division.

3. The amount or value involved in this suit or controversy, exclusive of interest and costs, exceeds the sum of Five Thousand Dollars ($5,000.00).

4. This is a suit to enforce legal and equitable liens upon and claims to personal property within the Northern District of Ohio, Western Division, in which this suit is brought.

5. For many years the Toledo Scale Company and The Computing Scale Company were competitors in the manufacture of computing scales, manufactured or claimed to be manufactured under letters patent of the United States.

About May 23, 1910, The Computing Scale Company filed its bill of complaint and brought suit against the Toledo Scale Company in the Circuit Court of the United States for the
141 Northern District of Illinois, Eastern Division, being cause No. 30024 in Equity, for the alleged infringement by the

Toledo Scale Company of certain letters patent, which suit, after an appeal to the Circuit Court of Appeals for the Seventh Circuit, was tried before a Master, who reported to the Court that The Computing Scale Company was entitled to recover from The Toledo Scale Company Four Hundred and Four Thousand, One Hundred and One Dollars and Ninety-seven Cents ($404,101.97), as for profits made by the Toledo Scale Company on the manufacture and sale of the scale claimed to be an infringement.

6. On or about February 21, 1919, the Toledo Scale Company entered into an agreement in writing with The Summit Trust Company, as Trustee, wherein it was recited that the aforesaid Master had filed said report and that a decree was expected to be entered by said court in the immediate future for the payment of said amount with interest from April 30, 1916, and that the Toledo Scale Company desired to appeal from such a decree to the United States Circuit Court of Appeals for the Seventh Circuit, but in order to do so was required to give an appeal bond for an amount to be fixed by said court.

The agreement further recited that Fidelity and Deposit Company of Maryland had agreed to act as surety on such an appeal bond on condition that it be fully indemnified and that the Scale Company proposed to furnish such indemnity by drawing and delivering to Fidelity and Deposit Company of Maryland its checks upon certain banks, being the defendant banks herein named, or their predecessors, which checks in the aggregate should equal the penal amount of said appeal bond, that Fidelity and Deposit Company should then deposit the money with the banks against which said checks were drawn and receive from such banks, respectively, certificates of deposit in the amounts of the several checks payable unconditionally to Fidelity and Deposit Company upon demand, bearing interest at the rate of three per cent. (3%) per annum, that Fidelity and Deposit Company of Maryland was to allow the money represented by such certificates of deposit to remain with such banks until the expected decree was reversed, paid, or settled, and the liability on said appeal bond released.

Upon receipt of such certificates of deposit, Fidelity and Deposit Company was to execute said appeal bond.

142 It was further recited that the Scale Company then had loans outstanding from the Toledo banks therein named, and desired to continue such loans either in their then amounts or in greater or less amounts as the business required, and that the Scale Company proposed to borrow from said banks and from the Guardian Savings and Trust Company of Cleveland, for the purpose of providing the indemnity above set forth, further sums aggregating Four Hundred Fifty Thousand Dollars ($450,000.00), with interest at the rate of seven per cent. (7%) per annum. An exhibit was then made of existing loans, and the proposed loans with each of the banks, and it was recited and agreed that if any further loan was required on account of an increase of the penalty of the appeal bond beyond the expected amount, such additional loan would be made by the Second National Bank of Toledo. It was agreed that all

loans, either existing or future, should be evidenced by promissory notes, all of which should be secured as provided in the agreement.

It was further set forth and agreed that as collateral security for said loans, both existing and prospective, the Scale Company should assign and deliver into the possession of The Summit Trust Company, as Trustee, Six Hundred Fifty Thousand Dollars ($650,000.00) of bills receivable, Forty-eight Thousand Five Hundred Dollars ($48,500.00) of United States bonds, Fifteen Hundred Dollars ($1,500.00) of Canadian Victory Bonds, and Five Thousand Dollars ($5,000.00) of stock of the Morris Plan Bank of Toledo.

It was further provided that as further security for such loans, the Scale Company should deposit with The Summit Trust Company, as Trustee, on the first day of each month, Five Thousand Dollars ($5,000.00) of United States Liberty or Victory Bonds, or in lieu thereof Five Thousand Dollars ($5,000.00) in cash.

It was further provided that as further security for said loans the Scale Company should assign, and it did thereby assign to The Summit Trust Company, as Trustee, all its interest in and to the certificates of deposit which were to be issued by the several banks to the Fidelity and Deposit Company of Maryland, which might be in excess of the sum eventually required to satisfy said decree.

Said agreement further provided that certain bills receivable of the Scale Company had been pledged to the Toledo banks and that such bills receivable had been placed in the custody of
143 one W. A. Zolg, Trustee for the several banks, and it was provided that the same should thereafter be held by The Summit Trust Company as Trustee, and that such bills receivable should be held as collateral security for all loans, either existing or prospective, made by all of said banks.

Said agreement was duly executed by the Toledo Scale Company and The Summit Trust Company as Trustee, and the Trustee took possession of the bills receivable, bonds, stock, and property mentioned and described in said agreement, and thereupon, The Summit Trust Company, Trustee, at the request of all said banks and Fidelity and Deposit Company of Maryland, agreed to hold said property and security for their security, benefit and protection, as provided in said agreement.

7. Shortly following the execution of the agreement aforesaid and the delivery of said securities, the Toledo Scale Company borrowed from the banks the sum of Four Hundred Fifty-five Thousand Dollars ($455,000.00), and thereupon drew its checks in favor of Fidelity and Deposit Company as required by said agreement, and said checks in turn were deposited by Fidelity and Deposit Company with the several banks, and the certificates of deposit of said several banks were issued and delivered in Fidelity and Deposit Company.

About the same time, an agreement was made between Fidelity and Deposit Company and United States Fidelity and Guaranty Company, Toledo Scale Company, and parties to the agreement of February 21, 1919, to the effect that the United States Fidelity and

Guaranty Company should join Fidelity and Deposit Company as surety on the proposed bond, and that it should have and it was thereby given the benefit, protection and security of the aforesaid agreement.

8. Thereafter and about March 11, 1919, Toledo Scale Company, as principal, and United States Fidelity and Guaranty Company and Fidelity and Deposit Company of Maryland as sureties, executed a supersedeas bond in the sum of Four Hundred Fifty Thousand Dollars ($450,000.00), conditioned for payment in the event the Toledo Scale Company should fail in its appeal to the Circuit Court of Appeals for the Seventh Circuit, and said bond was duly filed in the District Court for the Northern District of Illinois, Eastern Division, and was approved by one of the Judges of said Court.

144 9. About June 4, 1919, the Toledo Scale Company, on the one part, and Fidelity and Deposit Company of Maryland on the other, entered into a collateral agreement reciting the execution of said bond of Four Hundred Fifty Thousand Dollars ($450,000.00) and the delivery of certificates of deposit as follows:

The Guardian Savings & Trust Company, Cleveland..	$200,000.00
Northern National Bank, Toledo.....	55,000.00
National Bank of Commerce, Toledo, (now Commerce Guardian Trust & Savings Bank).....	75,000.00
First National Bank, Toledo	50,000.00
Second National Bank, Toledo	75,000.00

Said agreement set forth that said certificates had been delivered to Fidelity and Deposit Company of Maryland to protect it against all liability, loss, costs or damages on account of its having signed said bonds, and said agreement then provided that the Fidelity and Deposit Company should have the right in its discretion to retain said collateral until the liability of the Fidelity and Deposit Company on account of having filed said bond should cease and terminate, and at its option it might reclaim said collateral for its protection as surety upon any other bond which it had theretofore or might thereafter execute for the Toledo Scale Company.

The agreement further provided that in case Fidelity and Deposit Company for, or by reason of, or in consequence of having entered into or executed said bond or any other bond then or thereafter, for the Toledo Scale Company, should, for any cause, at any time, sustain or incur any liability or be threatened with any liability, or be put to any loss, costs, charges, suits, damages, counsel fees, or expenses of whatever kind or nature, it should have at any time or times thereafter full power and authority without notice to sell, assign and deliver said collateral or any part thereof at any broker's board or at private sale at its option, with the right to be purchaser itself at any such sale and to appropriate all the proceeds or such part of same as should be necessary in order to protect itself against any loss, and after so protecting itself, the remainder of said collateral, or the

oceeds, if any, should be paid to the Toledo Scale Company, or to the person or persons legally authorized to receive the same.

5 About the same time an agreement was entered into between Fidelity and Deposit Company of Maryland and United ates Fidelity and Guaranty Company to the effect that in considera- on of its joining as surety on the aforesaid supersedeas bond of our Hundred Fifty Thousand Dollars ($450,000.00) the United ates Fidelity and Guaranty should have the benefit and protection said collateral agreement.

10. Thereupon, Toledo Scale Company prosecuted its appeal, and on said suit coming on to be heard in the Circuit Court of Appeals r the Seventh Circuit, the judgment of the District Court was firmed, and thereupon, as a condition of obtaining a stay of the andate, it was ordered that the Toledo Scale Company file an addi- onal bond in the sum of Fifty Thousand Dollars ($50,000.00), hich was done about November 15, 1921, with the Fidelity and De- sit Company of Maryland as surety.

Thereupon an agreement in writing was made between the Toledo ale Company and Fidelity and Deposit Company, to the effect at the Fidelity and Deposit Company should have the benefit and rotection of the security theretofore provided for.

After the decision of the Circuit Court of Appeals for the Seventh ircuit, affirming the judgment against the Toledo Scale Company, as entered, the Toledo Scale Company applied to the United States upreme Court for a writ of certiorari, which was denied by said ourt.

11. The defendant, The Computing Scale Company, claims that y reason of the execution of said bonds and the denial of said peti- on for a writ of certiorari, the obligation of Toledo Scale Company, idelity and Deposit Company of Maryland, and United States idelity and Guaranty Company to pay the amount of said judgment nd to pay on said bonds such amount as is required to satisfy said udgment or decree has become absolute, and it has demanded and is ow demanding payment of said judgment, and it will, unless re- trained as herein prayed, commence suits against Toledo Scale ompany, Fidelity and Deposit Company of Maryland, and United tates Fidelity and Guaranty Company on said bonds, that by rea- on of the execution and delivery of said bonds in favor of the Com- uting Scale Company and the execution and delivery of the in- demnity agreements hereinbefore set forth, and the execution and delivery of said agreements between the Toledo Scale Com-

46 pany and The Summit Trust Company, as Trustee, and said banks, The Computing Scale Company has a lien or interest, r claims to have a lien or interest in, to or upon the security and roperty held by The Summit Trust Company, Trustee, the cer- ificates of deposit held by the Fidelity and Deposit Company of Maryland, and United States Fidelity and Guaranty Company, and he money deposited with said banks, and will, or may, unless re- trained as hereinafter prayed, proceed by suits against the several

banks and The Summit Trust Company, Trustee, to enforce th lien, right or interest so claimed.

12. The Toledo Scale Company gives out and claims that th judgment in favor of The Computing Scale Company was obtaine by fraud or by the fraudulent suppression of material testimon and that by reason of said alleged fraud and suppression of testimon the Toledo Scale Company is entitled to have the enforcement of sa judgment perpetually enjoined, and is entitled to have the certif cates of deposit aforesaid, and the securities and property held b The Summit Trust Company, Trustee, and the money deposited wit said banks, freed and discharged from any alleged lien, claim o right of The Computing Scale Company.

13. Neither the Fidelity and Deposit Company of Maryland, no United States Fidelity and Guaranty Company have any interes whatever in the controversy between the Toledo Scale Company an The Computing Scale Company, and they are entirely ignorant o the respective rights of said parties, but on account of said conflictin claims and demands they cannot safely pay to The Computing Scal Company the judgment aforesaid, nor can they surrender to th Toledo Scale Company the certificates of deposit aforesaid, nor ca they release their rights and liens in or upon the money deposite with said banks and the securities and property held by Summi Trust Company, Trustee.

The Fidelity and Deposit Company of Maryland and United State Fidelity and Guaranty Company now offer to bring into court a any time, pursuant to any order or decree of this court, the certif cates of deposit aforesaid, duly endorsed in such manner as thi court may require, and they offer to release and discharge their lie or claims upon the money deposited in said banks, and securities o property held by The Summit Trust Company, Trustee, whenev this court shall relieve them from further obligation or liability t the Toledo Scale Company and The Computing Scale Company.

147 14. They further show that the Toledo Scale Company ha heretofore in this court commenced suit against The Com puting Scale Company and the said banks, Fidelity and Deposit Com pany of Maryland and United States Fidelity and Guaranty Com pany, for the purpose of enjoining the enforcement of said judgment and for the purpose of discharging said certificates of deposit, mone and property from the liens, claims and demands of The Computin Scale Company and other parties, and that the Toledo Scale Com pany threatens to, and unless restrained as hereinafter prayed, wil proceed by other suits against Fidelity and Deposit Company o Maryland and United States Fidelity and Guaranty Company an other parties in this and other jurisdictions, to assert its allege rights and claims, and that by reason of the conflicting claims of th Toledo Scale Company and The Computing Scale Company a mul tiplicity of suits will arise and will be imposed upon all the parties t their great and irreparable loss, costs, damage and expense.

15. They further show that all the property hereinbefore referred to is within the limits of the jurisdiction of this court, and the rights and claims of the several parties can only be determined by the decree of this court, and that this court may and should, so far as necessary to prevent a multiplicity of suits, and so far as necessary for the protection of the parties against irreparable loss, assume jurisdiction over and take custody of said property.

16. That by reason of the premises and the desire and willingness of Fidelity and Deposit Company and United States Fidelity and Guaranty Company to make payment either of said bonds or make delivery of said certificates of deposit, they are entitled to be relieved from further liability to either and both said Scale Companies, and are entitled to recover from the Toledo Scale Company and The Computing Scale Company, or are entitled to be paid from the property, certificates of deposit, and money hereinbefore referred to, all their costs and expenses, including attorney fees, expended or incurred in bringing and prosecuting this suit, or in the defense against the conflicting claims of the Toledo Scale Company and The Computing Scale Company.

17. By reason of the premises, Fidelity and Deposit Company of Maryland, and United States Fidelity and Guaranty Company have no full, adequate and complete remedy at law and are without remedy save and except in this court.

148 Wherefore, Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company pray that the parties and defendants to this suit may be required to set forth herein all their claims, demands and liens of every nature, but not under oath, answer under oath being waived, and that they may be required to interplead and settle, adjust and have adjudicated herein their demands, claims and liens as between themselves; that by the decree of this court, Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company may be permitted to deliver to this court, or in accordance with the decree of this court, the aforesaid certificates of deposit and a proper release and discharge of their right, title or interest in or lien upon the money, property or security hereinbefore referred to; that they may be relieved by the decree of this court from all obligation and liability to the Toledo Scale Company, The Computing Scale Company, and the parties and defendants to this suit, and that all said parties may be required by the decree of this court to execute and deliver appropriate releases and discharges of all such obligations and liability.

They further pray that the Toledo Scale Company and The Computing Scale Company, and each of them, be restrained and enjoined from bringing or prosecuting otherwise than in this suit and in this court any suits, actions or proceedings of any nature against Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company; that a preliminary restraining order and preliminary injunction may be issued to said effect, and that upon the final hearing hereof, said injunction may be made perpetual.

They further pray that this court may take such custody of the certificates of deposit, money and property hereinbefore described as this court shall deem necessary or appropriate for the protection of Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company, and the parties and defendants in this suit.

They further pray that they may have such other and further relief as the court may deem just and equitable.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By MARSHALL & FRASER,
Their Solicitors.

E. J. MARSHALL,
Counsel.

149 *Præcipe.*

To the Clerk:

Please issue subpœnaes according to law in the above suit of Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company against Toledo Scale Company, The Computing Scale Company, First National Bank of Toledo, Second National Bank of Toledo, Northern National Bank of Toledo, The Commerce Guardian Trust and Savings Bank, the Guardian Savings Bank and Trust Company, and The Summit Trust Company, Trustee, returnable according to law, as follows:

To the United States Marshal for the Northern District of Ohio, Western Division, against Toledo Scale Company, First National Bank of Toledo, Second National Bank of Toledo, Northern National Bank of Toledo, The Commerce Guardian Trust and Savings Bank and The Summit Trust Company, of Toledo, Ohio.

To the United States Marshal for the Northern District of Ohio, Eastern Division, against The Guardian Savings and Trust Company, of Cleveland, Ohio.

To the United States Marshal for the Southern District of Ohio, against The Computing Scale Company.

MARSHALL & FRASER,
Solicitors for Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company.

150 EXHIBIT VI.

In the United States District Court, Northern District of Ohio, Western Division.

In Equity.

No. 307.

TOLEDO SCALE COMPANY, Plaintiff,

v.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, United States Fidelity and Deposit Company, et al., Defendants.

Answer of The Computing Scale Company to the Amendment to the Bill of Complaint Adding the United States Fidelity and Guaranty Company as a Party Defendant.

1. The Computing Scale Company, not waiving its special appearance in its answer filed herein, nor its objections to the jurisdiction of this Court made in said answer, nor its exceptions contained in said answer, nor its plea therein, nor its motion to dismiss the bill of complaint herein, says that it has no information as to the allegations of said amendment and therefore denies the same, except that it admits the incorporation and citizenship and residence of the United States Fidelity and Guaranty Company as alleged, and that it admits the giving of said bonds as alleged and the terms thereof, and it admits that mandate will be issued from said Circuit Court of Appeals, but whether said bonding companies will then pay said bonds this defendant is not informed, but hopes that said bonds will be paid without any attempt by said bonding companies to avoid this liability, and this defendant admits the amount alleged to be due on said bonds and this defendant renews its denials as
151 made in its answers to said bill of complaint and prays to be hence dismissed with its costs.

THE COMPUTING SCALE COMPANY,
By SAMUEL M. HASTINGS,
President.

ERWIN E. EFFLER &
LE ROY EASTMAN,
JOHN M. ZANE AND
CHARLES F. MORSE,
Counsel for The Computing Scale Company.

STATE OF ILLINOIS,
County of Cook, ss:

Samuel M. Hastings, having been first duly sworn, deposes and says that he is the President of The Computing Scale Company, defendant above named, that he has read the foregoing answer and knows its contents and that the matters and things therein stated are true of his own knowledge.

SAMUEL M. HASTINGS.

Subscribed and sworn to before me this 27th day of January, 1922.

[SEAL.] STELLA S. NUGENT,
Notary Public.

152 In the United States District Court, Northern District of Ohio, Western Division.

In Equity.

No. 307.

TOLEDO SCALE COMPANY, Plaintiff,

v.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, United States Fidelity and Deposit Company, et al., Defendants.

Answer of The Computing Scale Company to the Amendment to the Bill Making the Summit Trust Company a Party.

1. This defendant, The Computing Scale Company, not waiving its special appearance in its answer filed herein, nor its objections to the jurisdiction of this Court made in said answer, nor its exceptions contained in said answer, nor its plea therein, nor its motion to dismiss the bill of complaint herein, says that as to the allegations of added paragraph 34 of said bill of complaint it has no information as to said allegations and therefore denies the same, and this defendant denies that it has or can claim any interest or lien upon the securities alleged to be deposited under the alleged agreement set forth in said amendment, and said defendant prays to be hence dismissd with its costs.

THE COMPUTING SCALE COMPANY,
By SAMUEL M. HASTINGS,
President.

ERWIN E. EFFLER &
LE ROY EASTMAN,
JOHN M. ZANE,
CHARLES F. MORSE,
Counsel for The Computing Scale Company.

153 STATE OF ILLINOIS,
County of Cook, ss:

Samuel M. Hastings, having been first duly sworn, on oath says, That he is President of The Computing Scale Company, defendant above named, that he has read the foregoing answer and knows its contents and that the matters and things therein stated are true of his own knowledge.

SAMUEL M. HASTINGS.

Subscribed and sworn to before me this 27th day of January, 1922.
[SEAL.] STELLA S. NUGENT,
Notary Public.

154 In the United States District Court, Northern District of Ohio, Western Division.

In Equity.

No. 307.

TOLEDO SCALE COMPANY, Plaintiff,

v.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMPANY of Maryland, United States Fidelity and Deposit Company, et al., Defendants.

Separate Answer of The Computing Scale Company to the Petition for Affirmative Relief of the Fidelity and Deposit Company of Maryland and the United States Fidelity and Guaranty Company.

1. This defendant, The Computing Scale Company, not waiving its special appearance in its answer filed herein, nor its objections to the jurisdiction of this Court made in said answer, nor its exceptions contained in said answer, nor its plea therein, nor its motion to dismiss the bill of complaint herein, admits the allegations of paragraphs 1, 2 and 3 of the said petition, and denies the allegation of paragraph 4 of said petition.

2. Answering paragraph 5 of said petition, this defendant admits that the two scale companies named were competitors as alleged and admits the bringing of said action as alleged and denies that the said action was tried before a Master as alleged, but alleges that upon a reference, the matter of an accounting of profits was heard before said Master and admits that said Master reported as alleged.

3. This defendant, answering paragraph 6 of said petition, says that it has no information regarding the alleged agreement between the Toledo Scale Company and the Summit Trust Company, as Trustee, of February 21, 1919, and therefore denies all the allegations as to the provisions of said agreement contained in said paragraph 6,

and all the allegations of said paragraph 6 as to the execu-
155 tion of said alleged agreement, and the alleged agreement of the Summit Trust Company as Trustee.

4. This defendant, answering paragraph 7 of said petition, says that it has no information as to said allegations and therefore denies the same.

5. This defendant admits the allegations of paragraph 8 of said bill.

6. This defendant, answering paragraph 9 of said petition, says that it has no information as to the alleged agreement mentioned in said paragraph 9 between the Toledo Scale Company and the Fidelity and Deposit Company of Maryland and the alleged agreement between the Fidelity and Deposit Company of Maryland and the United States Fidelity and Guaranty Company, and therefore denies said allegations.

7. This defendant, answering paragraph 10 of said petition, admits the allegations of said petition as to the prosecution of an appeal and the execution of a further bond except that this defendant says that it has no information as to whether the same was done after the alleged agreements above mentioned, and this defendant has no information as to the further agreement alleged between the Toledo Scale Company and Fidelity and Deposit Company and therefore denies the said allegations, but it admits that application was made as alleged for a writ of certiorari and admits that the same was denied.

8. This defendant, The Computing Scale Company, admits that it claims that the obligation to pay in said bonds has become absolute and alleges that said cause is still pending on appeal in said Circuit Court of Appeals, and admits that upon such obligation becoming absolute, it will demand payment of said decree, called a judgment in said petition, but denies that it will commence suits on said bonds, but alleges that in the District Court of the United States for the Northern District of Illinois, Eastern Division, upon the filing therein of mandate from said Circuit Court of Appeals, it will in said cause ask judgment on said bonds if the said decree be not paid, and if said judgment be not entered, that it will bring suit on said bonds.

But this defendant denies that by reason of the execution or delivery of said bonds or either of them in favor of The Computing Scale Company or the execution or delivery of the alleged indemnity agreements or any of them set forth in said petition herein
156 answered, or by reason of the execution or delivery of said alleged agreements or any of them between the Toledo Scale Company and the Summit Trust Company, as Trustee, and said banks, or for any other reason or at all, The Computing Scale Company has any lien or interest or claims any lien or interest in or to or upon the security or property held by the Summit Trust Company, as Trustee, as alleged, or upon any of said security or property, if any there be, or upon the certificates of deposit held by the Fidel-

ity and Deposit Company of Maryland and United States Fidelity and Guaranty Company or either of them, or upon any of such certificates, if any there be, or the money deposited with said banks or any of it, if any there be, or will or may unless restrained proceed by suits or otherwise against the several banks or any of them and against the Summit Trust Company, or either of said banks or Summit Trust Company, to enforce any lien or right or interest claimed, and denies that it claims any lien or right or interest as alleged or otherwise, or that it will proceed against either said banks or Summit Trust Company or any or all of them for any reason or at all.

On the contrary this defendant alleges that it is not a party to said alleged agreements between the Toledo Scale Company and said Summit Trust Company and said banks or any agreement between said Toledo Scale Company and said bonding companies or either of them, that it neither has nor claims nor can it have or claim any lien upon or interest in any security or property or money deposited under either or any of said agreements, and alleges that such fact that no such claim by The Computing Scale Company against such security, property or money was made or could be made or exists, was well known by said petitioners in the petition herein answered, and the allegation of such claim by The Computing Scale Company in said petition was false and known to the said petitioners to be false when made, it being apparent as a matter of law that no such claim could be made by The Computing Scale Company, and such allegation of such claim is collusively made in said petition in pursuance of an understanding and conspiracy between the Toledo Scale Company and the Fidelity and Deposit Company of Maryland and the United States Fidelity and Guaranty Company, whose purpose is to seek to give this Court jurisdiction, and this defendant, The Computing Scale Company, alleges that by the terms of the al-
157 leged agreements, no controversy can arise between The Computing Scale Company and the parties to said alleged agreements or any of them, if any such alleged agreements there be, upon any such agreements, and this defendant alleges that it had no knowledge or notice whatever of any of said agreements until allegation thereof was made in this case.

9. This defendant admits that the Toledo Scale Company makes the claim as to said decree alleged in paragraph 12 of said petition but denies that the same is made in good faith, but alleges that such claim was presented and made to said Circuit Court of Appeals and adjudicated by said Circuit Court of Appeals in its judgment in 1913 and again in 1921 and such matter is res judicata, but this defendant denies any claim by said Toledo Scale Company that it is entitled to the said certificates, security or property freed or discharged from any alleged lien or claim or right of The Computing Scale Company thereon or thereto, and alleges that The Computing Scale Company makes no such claim of alleged lien or right.

10. This defendant denies, as alleged in paragraph 13 of said petition, that said petitioners therein have no interest in the alleged controversy or are ignorant of the respective rights of said parties,

and denies that on account of any alleged conflicting claims they cannot safely pay to The Computing Scale Company the decree aforesaid, but this defendant alleges that under the terms of the alleged agreements the said petitioners can have no controversy with The Computing Scale Company either as to the obligation of said bonds, or as to the certificates of deposit or any lien or liens of said petitioners upon said alleged securities and money deposited, and it is only in the event of payment of said bonds by said petitioners, the bonding companies, that any controversy can arise, that by the alleged terms of agreement the said bonding companies have the absolute and unconditioned right to now collect said certificates of deposit, as is admitted by the Toledo Scale Company in its bill of complaint, and said agreement alleged as to the alleged securities deposited with the Summit Trust Company gives said petitioners no interest whatever in said securities so deposited.

As to the offer of said petitioners to bring said certificates into court and deposit the same, The Computing Scale Company says that such offer or such deposit cannot release the said petitioners upon said bonds and this Court has no jurisdiction so to re-
158 lease them or either of them, since the petitioners admit the execution of said bonds and that their obligation thereon has now become absolute and as to said certificates and securities The Computing Scale Company has and can have no controversy with said petitioners or with said Toledo Scale Company.

11. This defendant denies that the Toledo Scale Company has brought suit as alleged in paragraph 14, but admits that said Toledo Scale Company has brought suit in this action to enjoin the enforcement of said decree, but said Toledo Scale Company admits that said petitioners have the right to collect said certificates and hold said moneys represented thereby and that said banks have no right to refuse to pay said certificates, and whether the enforcement of said decree be enjoined or not, no controversy can arise and no controversy has yet arisen in regard to said certificates and securities, and this defendant denies that the Toledo Scale Company can or will bring suits in other jurisdictions or that by reason of any conflicting claims of the Toledo Computing Scale Company and The Computing Scale Company the petitioners are or will be exposed to a multiplicity of suits.

12. This defendant denies each and every allegation of paragraph 15 of said petition.

13. This defendant denies that by reason of the alleged premises or by the alleged desire or willingness of said petitioners to make payment of said bonds or make delivery of said certificates, said petitioners are, or either of them is, entitled to be relieved from further liability to The Computing Scale Company or that this Court has any jurisdiction to substitute said certificates for said petitioners' liability on said bonds or that petitioners are entitled to be paid their costs and expenses as alleged or that The Computing Scale Company has any interest in any alleged controversy of petitioners with said

Toledo Scale Company, and denies that petitioners are stakeholders with no adverse interest or are entitled to maintain any bill of interpleader herein.

And this defendant says that said petitioners, in and by their said petition, have not made or stated any ground for relief or discovery against this defendant, and this defendant asks that said petition may be dismissed.

And this defendant says that the matters and things alleged in said petition as ground for relief are not in any way germane to
159 the alleged cause of action set up in the bill of complaint of plaintiff as to the enjoining of the enforcement of said decree, and this defendant prays that the said petition may be dismissed.

And this defendant says that the said petition is based upon separate and distinct controversies, namely, one as to the liability of petitioners upon said appeal bonds, the other as to the rights of petitioners under said alleged trust agreement and collateral agreement as to which this defendant has and can have no interest and claims no interest, and this alleged latter case of action has and can have no connection with and does not arise out of the alleged cause of action to enjoin the enforcement of said decree and could not be the subject of an independent action against this defendant.

Wherefore the defendant, The Computing Scale Company, prays to be dismissed upon said petition with its costs.

THE COMPUTING SCALE COMPANY,
By SAMUEL M. HASTINGS,
President.

ERWIN E. EFFLER AND
LEROY EASTMAN,
JOHN M. ZANE AND
CHARLES F. MORSE,
Counsel for the Computing Scale Company.

STATE OF ILLINOIS,
County of Cook, ss:

Samuel M. Hastings, having been first duly sworn, on oath says:

That he is President of The Computing Scale Company, defendant above named, that he has read the foregoing answer and knows its contents and that the matters and things therein stated are true of his own knowledge.

SAMUEL M. HASTINGS.

Subscribed and sworn to before me this 27th day of January, 1922.
STELLA S. NUGENT,
Notary Public.

160 EXHIBIT VII.

In the District Court of the United States for the Northern District of Ohio, Western Division, October Term, A. D. 1921, to wit, January 28, 1922.

Present: Honorable John M. Killits, U. S. District Judge.

In Equity.

No. 307.

THE TOLEDO SCALE COMPANY

vs.

COMPUTING SCALE COMPANY et al.

Order.

The Court, for reasons set forth in a memorandum filed contemporaneously with this order, directs that the temporary restraining order heretofore granted herein be and the same is continued in full force and effect until and including February 7, 1922.

The defendant, the Computing Scale Company, objects and excepts on the ground that the court has no jurisdiction to grant said order; that the court has no power to make or continue a restraining order herein; that said order is contrary to Equity Rule 73, and said order is contrary to Section 17 of the Act of Congress of October 15, 1914.

January 28, 1922.

JOHN M. KILLITS,
District Judge.

161 In the District Court of the United States for the Northern District of Ohio, Western Division.

THE TOLEDO SCALE COMPANY, Complainant,

vs.

COMPUTING SCALE COMPANY et al., Defendants.

Memorandum Opinion.

KILLITS, *J.:*

Before the complaint in this case was filed, the court had entered upon the trial of a cause to a jury entitled "The United States v. McDowell," involving a very large amount of testimony. It has occupied the attention of the court in trial already for a period of nearly three weeks, the government not yet approaching the resting of its case. A number of important questions of evidence is raised,

yet undecided, and needing the attention and somewhat prolonged investigation by the court. In addition, we have, at such hours as may be occupied without interfering with the progress of the case above named, much important and unfinished business which cannot be laid aside without serious effect upon the due administration of justice. So far with affidavits filed in this cause since the entry of the order of January 19, the court is presented with records extraordinarily voluminous submitted by the defendant and impossible of fair consideration within a reasonable time. These bear upon the question which the court deems to stand acutely at the threshold of the interlocutory motion, namely, whether or not the issues in this case are not so similar to issues determined in the action recently prosecuted by the principal defendant hereto, the Computing Scale Company, against the complainant, in the courts of the Seventh Circuit, that this court ought not to entertain the interlocutory motion herein for any purpose. The consequence is that the court finds itself unquestionably without any opportunity to give the preliminary contentions of the parties in this case, and particularly that just above referred to, any present fair attention, considering their importance. In addition, the defendant has not yet had time to answer, if it desires to answer, the affidavits referred to, particularly those of Edward Rector, Ira C. Koehne, and Border Bowman, filed January 26, 1922, which the court regards as having particular signifi-
162 cance respecting the specially acute matter above referred to.

As noted in the record (order of January 19) the present question arising in this case is upon the motion of the defendant, The Computing Scale Company, to dismiss the application for a preliminary injunction. We are urged that under the provisions of Section 17 of the Act of October, 1914, commonly known as the Clayton Act, the defendant has claims upon the court's attention and for the court's immediate consideration, which are paramount to any other matter before the court except older matters of the same character. The language of the statute is as follows:

"In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

The language of the statute is substantially that of Equity Rule 73. Our view of both statute and rule is that they control the court to the extent only (and within that limitation of course fully) so

far as the particular facts, in the exercise of a wise discretion, permit a full compliance therewith consistent with the interests of the parties. We do not believe that either is a hard and fast command that the right to a preliminary injunction must be determined within ten days after the issue of a temporary order, or that the applicant for a preliminary injunction can have no protection after the expiration of ten days if within that time circumstances are such that he was unable to get to the court his case on the interlocutory motion, nor is it a requirement upon an already over-burdened court to pass upon a motion for a preliminary injunction within the limitation, no matter how much labor is involved in due consideration. We feel that the law of either is fully honored if the court requires the applicant to proceed diligently, within the limitation, to the prosecution of his interlocutory motion,
163 and that it is clearly within the discretionary power of the court to continue his temporary protection until there can be presented, reasonable diligence being pursued, all the facts bearing upon the proposition, and that, further, the court shall have due opportunity to consider the issues and questions involved. In the case before us, within ten days, the complainant duly entered upon the presentation of facts supporting the motion for a preliminary injunction, asking for time to present further evidence. The complainant was met by the motion of the defendant to dismiss upon which defendant alone has offered the equivalent of more than three thousand pages of printed record, and we are invited by both parties to consider the numerous affidavits and exhaustive briefs with a large number of citation of authorities. Surely no one ever contemplated that either rule or statute should be applied, as defendant would apply it, to such a situation as this. Attention is called to the last clause of the statute that upon a motion of the opposite party to modify or dissolve the order, "the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require." We are just now considering such a motion and we propose to do just what the statute advises. But what is "expedition" depends upon the volume of work thrust upon the court to secure a proper determination.

Entertaining the views above set forth, and because of the matters of fact above stated which work compelling reasons therefor, but still endeavoring to be as expeditious as possible, we are entering contemporaneously with the filing of this memorandum an order extending the operation of the temporary restraining order for an additional period of ten days, within which time counsel may complete their presentation of briefs and affidavits bearing upon said motion of the defendant. If the court is unable to dispose of the motion within ten days, we purpose to further extend the period, and we deem it entirely within the court's discretion, if the motion to dismiss should be determined adversely to the defendant, to extend on proper terms the time even beyond ten days, during which the temporary restraining order shall remain in force and within which time plaintiff may complete its proof supporting its demand for a preliminary injunction.

The proof by affidavit already made is sufficiently impressive to suggest that there was no improvidence in the issuing of the temporary restraining order, and the unanswered affidavits filed by plaintiff on the 26th, together with our hasty review of defendant's answer, leaves the court with no present feeling that the
164 motion of defendant to dismiss might be allowed in the exercise of a just discretion. On the facts now appearing, we find stronger ground to justify a temporary restraining order than even in the first instance. It is to the defendant's interest, rather than otherwise, that we should take more time on its motion. We are convinced that in this we are in accord with approved practice. Mississippi Valley Trust Company v. Railway Steel Spring Co. 258 Fed. 346; Chicago, etc. R. R. v. Callicotte, 267 Fed. 799.

We have before us also a motion by one of the surety company defendants for an increase in the preliminary bond exacted of the plaintiff. That motion will be considered favorably in case the court determines at the expiration of the present extension upon a further extension for any purpose. The complainant also now moves for an order on the defendant requiring it to file in this cause all the exhibits introduced in evidence by the plaintiff (this defendant) in the case of Computing Scale Company v. Toledo Scale Company, No. 30024, in the United States District Court for the Northern District of Ohio, Western Division. We deem it unnecessary to pass upon this motion at the present time. We probably shall be inclined to rule favorably upon it should it be determined to proceed further in the hearing of the motion for a preliminary injunction.

January 28, 1922.

JOHN M. KILLITS,
District Judge.

165 In the District Court of the United States for the Northern District of Ohio, Western Division, October Term, A. D., 1921, to wit, February 7, 1922.

Present: Honorable John M. Killits, U. S. District Judge.

In Equity.

No. 302.

THE TOLEDO SCALE COMPANY, Complainant,

vs.

COMPUTING SCALE COMPANY et al., Defendants.

Order.

The court finding the same reasons existing set forth in a memorandum filed herein on the 28th of January, 1922, and finding also that the defendants have on this date, being the date when expires

the effect of the court's previous order in the premises, filed three affidavits of considerable length which the court has been unable to consider because of previous engagements, and the court being unable because of pressure of pending business entered upon before this case was filed to fully consider the motion of the defendant to dismiss this action for reasons in said defendant's motion given, it is ordered that the temporary restraining order heretofore granted herein be and the same is continued in full force and effect until and including February 13, 1922.

It is further ordered that the parties to this case having further affidavits to be filed previous to the determination of the court on the motion of the defendant to dismiss, as aforesaid, file said affidavits herein on or before the 10th instant.

The defendant, The Computing Scale Company, objects and excepts on the ground that the court has no jurisdiction to grant said order; that the court has no power to make or continue a restraining order herein; that said order is contrary to Equity Rule 73, and said order is contrary to section 17 of the Act of Congress of October 15, 1914.

JOHN M. KILLITS,
Judge.

166 In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

vs.

THE COMPUTING SCALE COMPANY et al., Defendants.

Affidavit of George R. Frye.

George R. Frye, being first duly sworn, upon his oath says that he is an Attorney-at-Law and that he was from 1914 to 1921 in charge of the Patent Department and of the Experimental Department of the Toledo Scale Company. That he was present in Providence, Rhode Island in February 1917 at the time and during the taking of the deposition of Thomas Z. Phinney in Cause Number 30024 then pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled "The Computing Scale Company vs. Toledo Computing Scale Company." That he saw the scales and drum which were then identified by said Thomas Z. Phinney and that same were thereafter in affiant's charge until he severed his former relationship with the Toledo Scale Company. That he is and at all times has been since said scales were produced by said Thomas Z. Phinney familiar with the appearance and marking of same and able to identify the said scales.

Affiant further says that he interviewed the said Thomas Z. Phinney on the 17th day of December, 1921 at Newark, New Jersey and there dictated for verification by said Thomas Z. Phinney the affidavit of Thomas Z. Phinney, which is attached to and filed with

the bill of complaint in the cause now pending in the United States District Court for the Northern District of Ohio, Western Division, entitled "Toledo Scale Company vs. The Computing Scale Company, et al."

Affiant files with this affidavit three scales and a separate
167 drum. Said scales are marked respectively by tags thereto attached

"The Computing Scale Company vs. Toledo Computing Scale Company, Eq. Number 30024, Defendants' Providence Exhibit Number 1, George Farnell, Notary Public,"

"The Computing Scale Company vs. Toledo Computing Scale Company, Eq. Number 30024, Defendant's Providence Exhibit Number 2, George Farnell, Notary Public."

"The Computing Scale Company vs. Toledo Computing Scale Company, Eq. Number 30024, Defendants' Providence Exhibit Number 3, George Farnell, Notary Public."

and said separate drum is marked by a tag thereto attached

"The Computing Scale Company vs. Toledo Computing Scale Company, Eq. 30024, Defendants' Providence Exhibit Number 4, George Farnell, Notary Public."

Said scale identified as aforesaid as "Providence Exhibit Number 3" also now bears a tag marked "Phinney Exhibit Scale" and said separate drum also bears another tag marked "Phinney Exhibit Original Drum."

Affiant further says that the said three scales and said separate drum marked as aforesaid are the three scales and separate drum which were identified by said Thomas Z. Phinney in his deposition taken in February 1917, as aforesaid, and are the same three scales and drum which the Toledo Scale Company offered in evidence but which the Master and the Court refused to receive in evidence in said cause in the District Court for the Northern District of Illinois, Eastern Division above mentioned.

Affiant further says that said scale bearing the tag marked "Phinney Exhibit Scale" and said drum bearing the tag marked "Phinney Exhibit Original Drum" are respectively the scale and separate drum referred to in the affidavit of Thomas Z. Phinney filed with the bill of complaint in said cause pending in the United States District Court for the Northern District of Ohio, Western Division, above mentioned.

Affiant further says that except that said exhibits have been somewhat injured through handling since same were produced by
168 said Thomas Z. Phinney in 1917, said exhibits and each of them is identical with and in the same condition as said exhibits as then produced.

Affiant further says that said three scales and said separate drum hereinbefore referred to and described and filed herewith are the same scales and drum and operating rack which were submitted to Charles W. Owen, of Toledo, Ohio, for examination, and which

are described and referred to by said Owen in his affidavit verifi on January 19, 1922 and heretofore filed in said cause pending the United States District Court for the Northern District of Ohi Western Division.

GEORGE R. FRYE.

Sworn to before me and subscribed in my presence this 6th da of February, 1922.

Notary Public, Lucas Cou-ty, Ohio.

169 And afterwards, on the same day, to-wit: On the tent day of February, 1922, in the October term aforesaid, "Pa of Exhibit II" was filed in the office of the clerk of this court, whic said "Part of Exhibit II" is in the words and figures following, to wit:

170 PART OF EXHIBIT II.

Filed Feb. 10, 1922. Edward M. Holloway, Clerk.

In the District Court of the United States for the Northern District of Ohio, Western Division.

TOLEDO SCALE COMPANY, Plaintiff,

v.

THE COMPUTING SCALE COMPANY, FIDELITY AND DEPOSIT COMpany of Maryland, First National Bank of Toledo, Ohio; Second National Bank of Toledo, Ohio; Northern National Bank of Toledo, Ohio; The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company, Defendants.

Separate Answer of the Defendant The Computing Scale Company.

1. The Defendant, The Computing Scale Company, appearing specially for the purpose of making the following objections to the jurisdiction of this Court over the matters and things set forth in the bill of complaint of the Plaintiff herein, says:

(*a*) That it appears by said bill of complaint that the only parties defendant within and subject to the jurisdiction of this Court and upon whom process can lawfully be served in this action are the defendants First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo Ohio, The Commerce-Guardian Trust and Savings Bank and The Guardian Savings and Trust Company, and the last named defendant is not subject to be sued in the Western Division of the Northern District of Ohio, and all said parties defendant last named are neither proper nor necessary parties to this action and are joined as parties defendant herein solely for the purpose of seeking to give

this Court jurisdiction, and the other parties defendant The Computing Scale Company and Fidelity and Deposit Company of Maryland are not subject to be sued in this Court and upon them process cannot lawfully be served in this action, and

(*b*) That it appears that there is a misjoinder of parties defendant in that the said defendants First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank and The Guardian Savings and Trust Company are each of them improperly joined as a defendant because each of them is not a proper or necessary party defendant, and,

(*c*) That the jurisdiction over the controversy and matters and things set forth in said bill of complaint is in the court
171 where the said decree whose enforcement is sought to be enjoined herein, is now pending, namely, the Circuit Court of Appeals for the Seventh Circuit and the court wherein said decree was rendered and will be hereafter pending, namely, the District Court of the United States for the Northern District of Illinois, Eastern Division, and,

(*d*) That no jurisdiction of this Court as a matter of usage and practice exists to enjoin the enforcement of a decree of another District Court of the United States rendered in such District Court sitting as a court of equity, where that latter Court can grant full relief.

2. The said Defendant, The Computing Scale Company, not waiving the objection to jurisdiction above set forth, and its special appearance therefor, objects and excepts to said bill of complaint in that the following portions of said bill of complaint and each of them is and are impertinent, irrelevant and immaterial and should be stricken from said bill of complaint:

(*a*) The second division of Paragraph numbered 3, all of Paragraph numbered 4, all that part of Paragraph numbered 5 which begins with the beginning of said paragraph and ends with the words "in further pursuance of said malicious and wrongful conspiracy and design" on page 5 in lines 6 and 7 of said bill of complaint.

(*b*) The words "with the malicious design and conspiracy and purpose hereinbefore set forth" in Paragraph 6, in lines 27 and 28 of page 5 of said bill of complaint.

(*c*) In Paragraph numbered 10 of said bill the words "in pursuance of said conspiracy and design to injure and destroy Plaintiff's business" on page 9, lines 14 and 15; and the words "in further pursuance of said conspiracy" on page 9, line 20, of said bill of complaint.

(*d*) The words in Paragraph 11 "still in pursuance of its designs to injure and defraud Plaintiff's business" on page 10, lines 12, 13 and 14.

(e) All of Paragraph numbered 21 of said bill of complaint.

And the said Defendant prays that the above mentioned portions of the said bill of complaint be stricken therefrom as impertinent.

3. The said Defendant, The Computing Scale Company, not waiving said objection to jurisdiction above set forth and the special appearance therefor and the exceptions for impertinence above set forth, further says that the Plaintiff has not in and by its said bill made or stated such a case as entitles it in a court of equity to any discovery or relief from or against this Defendant touching the matters contained in the said bill or any of such matters, and said bill of complaint is insufficient in point of law and this Defendant asks that said bill of complaint be dismissed.

4. And the said Defendant, The Computing Company, not waiving said objection to jurisdiction and the special appearance and the exceptions and objections in point of law heretofore set
172 forth, says that the said Plaintiff has been guilty of such laches in and concerning the subject matter of this suit as disentitles it to any relief therefor, and such laches has heretofore been adjudicated by the United States Circuit Court of Appeals for the Seventh Circuit.

5. The Defendant, The Computing Scale Company, not waiving the objections to jurisdiction above set forth and its special appearance therefor, and the exceptions to said bill of complaint above set forth, and the objections to said bill of complaint in point of law above set forth, and the defense of laches above set forth, for a plea to said bill of complaint and the matters and things therein alleged, on the ground of prior adjudication, says:

(a) That on the 25th day of June, 1910, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in chancery sitting, this Defendant, The Computing Scale Company, filed its bill of complaint against this Plaintiff, Toledo Computing Scale Company, in equity, suit No. 30,024, wherein The Computing Scale Company alleged that it was the owner by mesne assignments from Albert U. Smith, the patentee thereof, of Reissued Letters Patent No. 11,536, and that the said Toledo Computing Scale Company had infringed the same and prayed an injunction and an accounting of profits and damages. The said Toledo Computing Scale Company on the 1st day of August, 1910, filed its answer therein in which it alleged

"that prior to the alleged invention or discovery by the said Albert U. Smith of the alleged improvements described and claimed in said letters patent, the same and every material part thereof had been known and used by others in this country and had been patented and described in printed publications in this and other countries, and that the said alleged invention and every material part thereof had been in public use and on sale in this country for more than two years prior to the application of the said Albert U. Smith for said letters patent,"

and

"that prior to the invention by the said Albert U. Smith of the alleged invention and improvements described and claimed in said reissued letters patent, the said alleged invention and improvements, and every material and substantial part thereof, had been patented and described in various letters patent and printed publications, among others in letters patent of the United States No. 106,869, granted to William H. Phinney on August 30, 1870; No. 421,805, granted to Charles M. Babcock, February 18, 1890,"

and that for more than two years prior to the application of the said Albert U. Smith

"the said alleged invention and improvements described and claimed in said reissued letters patent and every material and substantial part thereof, were known to and used by, and were publicly used and offered for sale and sold by various persons at various places within the United States, and among others at Pawtucket, Rhode Island, by William H. Phinney, then and now, as Defendant is informed and believes, residing at said Pawtucket; at Garrattsville, New York, by Charles M. Babcock, then and now, as Defendant is informed and believes, residing at the City of Garratsville,"

173 and thereupon said cause being at issue testimony was taken.

(*b*) That to support the issue of anticipation and prior description and publication, the Toledo Computing Scale Company offered in evidence the said Phinney patent, and it appeared from the testimony of the Toledo Computing Scale Company's expert witness, John W. Culmer, that the said Phinney scale was not an operable scale, and the said Toledo Computing Scale Company voluntarily chose not to investigate nor to introduce evidence to support its allegation of prior public use and sale, but on the contrary its witness, John D. Burkholder, testified that he in connection with said action had been, prior to the taking of such testimony, investigating in different parts of the country trying to locate evidence concerning the prior art and concerning the manufacture of cylinder scales and the development of the said line of computing scales, and that the said John W. Culmer had mentioned to him the said Phinney patent and that he, the said Burkholder, did not investigate it and did not make any investigation to find out what had been done along the line of the United States patent to Phinney, 106,869, and the said Toledo Computing Scale Company was in no way prevented from investigating the patent as to said Phinney scale, and if it had investigated, it would then have ascertained all that it has since ascertained, but it voluntarily elected not to do so, but in spite of the proof of its own expert as to non-operability of the said Phinney scale, no evidence was sought as to its other manufacture or use or sale.

(*c*) That after the evidence had been concluded, upon hearing before the said District Court of the Northern District of Illinois,

Eastern Division, the said Court, on June 25, 1912, made and entered its decree adjudging the validity of said reissued Letters Patent No. 11,536, and that the same had been infringed and decreeing an accounting for profits and damages, and an injunction against Plaintiff.

(*d*) That thereupon said Toledo Computing Scale Company prayed and was allowed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and said appeal was duly perfected, and thereupon said cause was pending in the said United States Circuit Court of Appeals upon said appeal, and while the cause was so pending the said Toledo Computing Scale Company entered upon an investigation in regard to the said Phinney scale and discovered the facts which it claims to have discovered and now relies upon in regard to the said Phinney scale and the alleged acts of this Defendant with regard thereto, and thereupon, on the 21st day of January, 1913, the said Toledo Computing Scale Company, when the said cause came on to be heard in said Circuit Court of Appeals, pursuant to an order made January 7, 1913, by said Court, ordering that said cause be set down for hearing on January 21, 1913, filed a petition for and made a motion that its appeal be dismissed as to reissued patent No. 11,536 with leave to introduce newly discovered evidence in the District Court of the United States for the
174 Northern District of Illinois, Eastern Division, and in support thereof filed affidavits of newly discovered evidence which are substantially the affidavits filed upon the motion in said Circuit Court of Appeals by the Toledo Computing Scale Company, next hereinafter stated, and thereupon said motion to dismiss and for leave was argued to the said Court of Appeals by counsel for the respective parties, and on consideration thereof the said motion was denied by said Circuit Court of Appeals, and on the hearing of said motion the said Toledo Computing Scale Company presented to the said Circuit Court of Appeals three scales which it claimed to have been made and used under the said Phinney patent more than two years prior to the original application for said patent to Albert U. Smith. That the said Circuit Court of Appeals rendered the following opinion:

"It is a question for the discretion of the court, but we are of the opinion that the court's discretion should be exercised otherwise and should not be exercised to reopen the case by a bill of review or otherwise. In our view the court would have no right to let in the new evidence. It is obvious no diligence whatever was exercised in this matter. The matter was instantly discoverable by inquiry in the neighborhood affected. It is like a suit respecting boundary lines. Some one living along the boundary line knows about it and avers it on information and belief, but does not prove it, and then wants to reopen. He is not permitted to do that."

(*e*) That thereupon after argument of said appeal the said Circuit Court of Appeals on the 15th day of April, 1913, rendered its

opinion, a copy of which is hereto annexed marked Exhibit A and made a part hereof.

(*f*) That thereupon, on the 14th day of May, 1913, the said Toledo Computing Scale Company filed in said Circuit Court of Appeals its motion to include in the mandate to the District Court permission to said District Court to entertain and consider, and if so advised to grant, an application of the Appellant, Toledo Computing Scale Company, for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney, of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissued letters patent in suit in said cause, and to rehear said cause on such additional proof. And in support of said motion, and as a basis therefor, said Toledo Computing Scale Company submitted therewith the affidavits of Henry Theobald, Frank Parker Davis, Edward N. Pagelsen, Harry B. Sherwood, Bert W. King, Thomas Z. Phinney, E. Willard Horton, William M. Raymond, John H. Devlin, William H. Gillan, James A. Shepard, George Walker and Ralph C. Evans, copies of which affidavits are hereto attached marked Exhibit B, and made a part hereof, and which affidavits are printed in said Exhibit B in the first column thereof upon the respective pages thereof and in the second column of Exhibit B upon the respective pages thereof appear the affidavits filed upon the motion for an injunction in this Court, and at the end thereof appears the petition of the Toledo Computing Scale Company upon the first motion.

175 And thereupon, on the 14th day of May, 1913, the said Circuit Court of Appeals having heard the arguments of counsel for the respective parties and being fully advised ordered that the said motion be denied; that upon the hearing of the said motion last mentioned the same three scales, mentioned above, claimed by the Toledo Computing Scale Company to be Phinney scales, were presented and exhibited to the said Circuit Court of Appeals.

(*g*) That thereupon on the 14th day of May, 1913, the said Toledo Computing Scale Company filed its petition for rehearing, which petition on the 3rd day of July, 1913, was denied by said Circuit Court of Appeals.

(*h*) That thereupon, said cause having been remanded to said District Court of the United States in accordance with the order of said Circuit Court of Appeals, proof of title to said patent was made, and thereafter, upon hearing before the said District Court of the United States for the Northern District of Illinois, Eastern Division, the said Court last named made and entered its decree on May 6, 1914, wherein it adjudged the validity of said reissued Letters Patent No. 11,536, infringement thereof by the Toledo Computing Scale Company and a recovery of profits and damages by reason of said infringement, and a reference to the Master of said Court to take and state an account thereof, but no injunction was contained therein, because the patent sued upon had expired on September 3, 1912. And thereafter, on May 26, 1914, said accounting

was heard before said Master and continued until the 12th day of June, 1917, and during said accounting the said Toledo Computing Scale Company made a motion before said Master to fix a time and place in the City of Providence, Rhode Island, for the taking of testimony of certain witnesses, Thomas Z. Phinney and others, to the effect that for a period of upwards of twenty years prior to the time the said Toledo Computing Scale Company began to make and sell automatic scales embodying a cylinder or drum, certain weighing and computing scales with an indicator drum were extensively made at Pawtucket, Rhode Island, and were sold throughout the New England States, and that such scales were practically successful and commercial scales (Vol. III, p. 845, U. S. Supreme Court Record); that the said evidence was offered solely as a basis of comparison, and thereupon the said Master denied said motion on the ground that the proposed testimony would be incompetent, for the reason that the so-called standard of comparison rule did not apply in an accounting in a case involving the infringement of a patent covering an entire machine where the infringement consists in making and selling the infringing machine; that thereafter, notwithstanding the Master's said ruling, the Toledo Computing Scale Company took such depositions beginning on the 21st day of February 1917, and such depositions, together with exhibits of four of said Phinney scales and exhibits advertising the same prior to two years before the original application for said reissued Letters Patent No. 11,536, annexed to said depositions, were returned into said District Court of the United States for the Northern
176 District of Illinois, Eastern Division, and thereafter said Toledo Computing Scale Company offered the said depositions in evidence together with said exhibits before the said Master, and the Master rejected the same on the ground that the said depositions were taken without authority and such depositions were the depositions of Thomas Z. Phinney, John H. Devlin, Charles H. Tierney, E. Willard Horton, Joseph McNally, Daniel C. Fallon, William H. Gillan, Orwell C. Reeves and Edward J. Lindow; and said Orwell C. Reeves, a witness for the Toledo Computing Scale Company and the Superintendent of its scale factory, testified as follows:

"X Q. 321. Well, now, did you take any test weight, and test those Phinney scales as to their weighing?

"A. I did not.

"X Q. 322. Why didn't you do that?

"A. I didn't think they would weigh properly.

"X Q. 323. That thing wouldn't weigh at all, would it?

"A. I don't know. It would indicate some weight, but it wouldn't indicate a correct weight. The scale, of course, wouldn't weigh, with the kind of bearings the scale was constructed with." (Vol. III, p. 1445, U. S. Supreme Court Record.)

That thereafter the said Master made his report and the same was returned into said District Court on the 6th day of May, 1918, and

thereafter upon the hearing before said District Court upon exceptions to said Master's report the Court made and entered its final decree on the 5th day of March, 1919, whereby the said Master's report was approved and it was ordered, adjudged and decreed that the interlocutory decree of May 6, 1914, be made the final decree in this cause with respect to the matters decreed in said interlocutory decree, that the exceptions be overruled, that the Toledo Computing Scale Company had during the pendency of this cause changed its corporate name to Toledo Scale Company, and that the Plaintiff therein, The Computing Scale Company, upon the accounting of profits and damages do have and recover from the Defendant therein, Toledo Computing Scale Company, now Toledo Scale Company, Four Hundred and Twenty Thousand Eight Hundred and Eighty-three Dollars and Forty-four Cents, together with interest thereon from the date of said decree, and its costs and disbursements to be taxed, and that the Plaintiff have execution for the amount of said decree and costs. That both said interlocutory decree of May 6, 1914, and said final decree of March 5, 1919, were rendered long after the alleged discovery of the alleged facts as to said Phinney scales and as to suppression and secretion of evidence by Plaintiff now relied upon in the bill of complaint in this case, and said Toledo Computing Scale Company never applied to said District Court of the United States for the Northern District of Illinois by bill of review or by bill impeaching either of said decrees for fraud, although for many years it had full opportunity to do so.

(*i*) And thereafter on the 5th day of March, 1919, the said Toledo Computing Scale Company prayed and was allowed an appeal from said final decree, and thereafter said appeal was perfected and was pending in the United States Circuit Court of Ap-
177 peals for the Seventh Circuit, and thereafter, on February 4, 1921, said appeal came on to be heard on the record containing among other things said depositions taken as aforesaid together with the exhibits thereto, and the record upon said interlocutory decree and upon said final decree, and upon the briefs of counsel, and the Toledo Computing Scale Company, as Appellant, in its brief as to the said depositions as to the Phinney scale stated:

"The proofs now show that many years prior to Smith's invention Mr. Phinney, whose patent of 1870 is in the Main record (No. 106,869), manufactured and introduced into practical and commercial use a considerable number of thoroughly 'usable automatic computing scales' of the drum or cylinder type."

And it was further stated in said brief last mentioned:

"That Defendant is entitled to have the evidence rerespecting these Phinney scales considered on the merits of the case, and as affecting the validity of the patent in suit, not only because the Court has the full right, at any time prior to a final decree, to correct any error which it may have made in a previous ruling, but because of the fact

that its former ruling in this case was not and could not be in legal effect a formal adjudication of either the validity of the patent in suit or its infringement."

And it was further stated in said brief:

"As shown by the unanswered and uncontraditced affidavits in the printed record on Defendant's motion to reopen this case * * * the plaintiff had full knowledge of the Phinney scales throughout the present litigation, having previously brought a suit at Philadelphia upon the patent here involved, in which case voluminous evidence and exhibits respecting the Phinney scale were introduced by the defendant, and as the result of which the plaintiff voluntarily dismissed and discontinued the suit. Defendant in the present case had no knowledge whatever of these matters until after the former decision of this Court, as shown in the record on the motion to reopen above referred to, and as soon as they were discovered it promptly presented that motion. To refuse to consider the evidence in the present record respecting the Phinney scale, as affecting the validity of the patent in suit, would be to permit the plaintiff to take advantage of its concealment of essential facts known to it and unknown to the defendant or the Court and its consequent imposition on both."

That the said Circuit Court of Appeals treated the said matter offered by the Toledo Computing Scale Company regarding the said evidence as to the Phinney scales and the affidavits, as a petition in the nature of a bill of review and ruled as follows:

"Respecting the insistence that, on the proofs offered to the Master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1913 petition to reopen the case on the merits, should reverse our precedent decree upholding the validity of the patent, and should reverse the District Court's decree of 1914 and 1919 with the direction to dismiss the bill, we say:

"A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leads us to reject the demand.

178 "B. If it be regarded as a petition in the nature of a bill of review, appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review on the same ground, inclines us to stay our hands." (Vol. III, p. 2197, U. S. Supreme Court Record.)

And in its opinion the said Circuit Court of Appeals affirmed the said final decree of March 5, 1919, of the District Court, a copy of which opinion is hereunto annexed marked Exhibit C and made a part hereof.

(*j*) That thereafter, on the 17th day of December, 1921, the said Toledo Computing Scale Company served upon this Defendant, The Computing Scale Company, its petition for a writ of certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals for the Seventh Circuit, and thereafter on the 3rd day of January, 1922, the said Toledo Computing Scale Company presented in the Supreme Court of the United States its said petition, and in its said petition the Toledo Computing Scale Company set forth and alleged as follows:

"At the time the original record was made up defendant had no knowledge of any commercial manufacture and sale of the Phinney scales. It acquired knowledge of them while the appeal from the decree of the District Court was pending, and it moved in the Court of Appeals for leave to dismiss its appeal as to the reissued patent in suit, in order that the District Court might entertain an application to reopen the case for the newly discovered evidence. This motion was denied by the Court of Appeals. (Rec., Vol. I, p. 955.) Upon the handing down of the opinion of the Court of Appeals defendant at once petitioned that court 'to include in its mandate to the District Court permission to said District Court to entertain and consider, and if so advised to grant, an application of the defendant for leave to introduce proofs in said cause respecting' said scales (Vol. I, p. 967), supporting said petition with voluminous affidavits showing the reissued patent in suit to have been substantially anticipated by the Phinney scales, and showing further the diligent efforts of the defendant to fully develop the prior art in the making up of the original record, and the manner in which the newly discovered evidence finally came to its knowledge. (Vol. I, pp. 968-993.) The affidavits further showed that plaintiff had had full knowledge of the Phinney scales for more than ten years, that evidence and numerous samples of them had been introduced in a suit which plaintiff had brought at Philadelphia ten years earlier upon the reissued patent here in suit, that the prosecution of said suit had been abandoned because of such evidence, and that plaintiff had suppressed and concealed such fact from the court and defendant throughout the litigation in the present cause. (Vol. I, pp. 973-996.)"

That thereafter on the 9th day of January, 1922, the said petition for a writ of certiorari was denied by the said Supreme Court of the United States; that it appears that the issue as to suppression and concealment has been already made and presented to said Circuit Court of Appeals and to the Supreme Court of the United States.

(*k*) This Defendant, The Computing Scale Company, alleges that the facts claimed by Plaintiff as to any alleged concealment or
179 suppression of evidence by this Defendant which are contained in the affidavits filed in the Circuit Court of Appeals for the Seventh Circuit are the same facts as are contained in the affidavits filed in this Court, as will fully appear from Exhibit B hereto annexed where said affidavits filed in said Circuit Court of Appeals and said affidavits filed in this Court are printed in parallel

columns; and said facts were presented to said Circuit Court of Appeals as a ground for a bill of review in the year 1913, and said facts were again presented to said Circuit Court of Appeals as ground for a bill of review in the year 1921, and said alleged grounds of suppression and concealment for impeaching the decree as to the validity of the said patent were twice presented to and passed upon by said Circuit Court of Appeals, and this bill of complaint now filed by the said Toledo Computing Scale Company is an attempt to have this Court decide whether the said Circuit Court of Appeals committed error in its rulings upon said matter, and this Defendant alleges that the said decisions of said Circuit Court of Appeals for the Seventh Circuit are adjudications of all the matters in dispute in the said bill of complaint, and as to those matters the said Toledo Computing Scale Company, now Toledo Scale Company, is bound by said adjudications as a party thereto.

And for a record of all the preceding matters this Defendant presents herewith the printed record filed in the Supreme Court of the United States upon said petition for writ of certiorari, wherein said matters fully appear. That said cause is now pending in said Circuit Court of Appeals for the Seventh Circuit, that the order denying said petition for writ of certiorari has not been filed in said Circuit Court of Appeals and that said Court is now able to afford to the Toledo Computing Scale Company, if entitled thereto, full relief as to the matters complained of in the bill of complaint.

6. The Defendant, The Computing Scale Company, not waiving the defenses set forth in the preceding paragraphs 1, 2, 3, 4 and 5 of this answer and each of them, and each of the clauses thereof, for answer to the said bill of complaint says:

(*a*) That it admits the matters set forth in Paragraphs 1 and 2 of said bill.

(*b*) That it admits the allegations of the first division of Paragraph 3 of said bill, but denies that, as set forth in Paragraph 3 of said bill, in the second division thereof, the Defendant, The Computing Scale Company, at any time has been continously or otherwise engaged in any conspiracy to which its officers or directors or the Moneyweight Scale Company were parties, or to which any other persons were parties, or otherwise, to monopolize in violation of any law or otherwise the business of manufacturing computing scales or anything else, or to ruin Plaintiff or to drive it out of business, or that in pursuance of the conspiracy alleged or any conspiracy or otherwise, it did the acts alleged or any of them or any acts whatever, but as to said allegations this Defendant says that the same are impertinent.

180 (*c*) This Defendant denies each and every of the matters set forth in Paragraph 4 of said bill, except that it admits that a salesman of the Moneyweight Scale Company without the knowledge of said Moneyweight Scale Company got out a circular to the effect alleged in said bill of complaint as to one of said adver-

tisements, but alleges that as soon as the said circular was discovered by said Moneyweight Scale Company its circulation was stopped and the copies of it destroyed by said Moneyweight Scale Company, and this Defendant alleges that it did obtain in the litigation mentioned in said Paragraph 4 of said bill an injunctional order, which order was reversed by the said Circuit Court of Appeals for the Sixth Circuit, but denies that it was for the reason that said scales were in fact dishonest, but as to all of said allegations this Defendant says that the same are impertinent.

(*d*) This Defendant denies each and every allegation of Paragraph 5 of said bill, but admits that this Defendant obtained not a judgment but a decree against the Plaintiff in the amount stated for infringement of said patent, but this Defendant denies that said or any suits brought by this Defendant were, or were known to this Defendant to be, based upon false or fraudulent claims, or that in connection with said or any suit or otherwise, this Defendant was guilty of the alleged fraudulent acts and conduct in said bill thereinafter related, or any of them, or that said judgment or decree was rendered or obtained solely or at all by reason of said or any fraudulent conduct or imposition upon or deception of said District Court or the Plaintiff, or that this Defendant knew at all times, or at any time that it was prosecuting said litigation against Plaintiff or at any other time, that its said patent was invalid, and denies that said patent was invalid, and denies that if the alleged evidence had not been suppressed that said Court or courts would not, or could not, have found the said judgment or decree, and denies that any evidence was suppressed or kept from Plaintiff or anyone else, but on the contrary alleges that said alleged evidence was presented to both said District Court and said Circuit Court of Appeals.

(*e*) This Defendant denies that it began the said suit mentioned in Paragraph 6 of said bill with any malicious design or conspiracy or purpose as alleged, and denies that The Computing Scale Company did not press said suits for the reason alleged, but on the contrary it alleges that the said two suits in this Court were dismissed for the following reason: that in the cause pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, this Defendant applied for further time to take its evidence and the Toledo Computing Scale Company objected thereto for the reason that two suits upon the same patents were pending in this Court, and as a condition to obtaining an extension of time to take evidence this Defendant was required by said District Court of the Northern District of Illinois, Eastern Division,
181 to dismiss its said two suits in this Court, and said suits were for that reason dismissed, as appears by the sworn statement of Henry Theobald, President of the Plaintiff, in Exhibit B to this answer.

(*f*) This Defendant denies the bringing of the suit as alleged in Paragraph 7 of said bill, but alleges that said action was begun by this Defendant against the Federal Scale Company and Landers,

Frary & Clarke, and it admits that depositions were taken in said cause and that certain scales were made exhi its therein, but denies that said scales embodied a lightweight skeleton cylinder substantially identical with that called for by the Smith patent, or that the manufacture of any computing scales by said Phinney was with a lightweight cylinder or was a complete or any anticipation of the claims of said reissued patent, or that said evidence constituted a defense, and this Defendant admits that said case was not prosecuted, but denies that it was for the reason alleged, but on the contrary alleges that the said Federal Scale Company's infringement was not of sufficient importance to justify the expense of prosecuting said cause, and this Defendant denies any allegations as to suppression or concealment of said or any evidence in connection with said suit.

(*g*) This Defendant admits that it brought an action against said Randall as alleged in Paragraph 8 of said bill, and alleges that said action was not prosecuted for the reason that the infringement did not justify the expense of further prosecuting the same.

(*h*) This Defendant denies each and every allegation in Paragraph 9 of said bill.

(*i*) This Defendant admits the bringing of the actions mentioned in Paragraph 10 of said bill after the Plaintiff began in 1906 the infringement complained of, but it denies that it widely advertised said actions in pursuance of said conspiracy or design alleged or otherwise, and it admits that said actions were not brought to trial but alleges that such lack of prosecution was for the reason hereinbefore alleged, and denies that while the same were pending or at any other time this Defendant through its officers or agents or representatives or any of them or other persons, or at all, in further pursuance of said alleged conspiracy or otherwise or at all, secretly or in any other manner engaged in an effort to find all or any of the alleged Phinney scales, and denies that there were any such Phinney scales as alleged, and denies upon information and belief that it then had or ever had any Phinney scales, and denies that this Defendant did locate or secretly or otherwise purchase or take into its possession any Phinney scales, and denies that it searched for any of said Phinney scales with the purpose alleged or at all, or that it did destroy or secrete any Phinney scales, or that it suppressed or kept from the Plaintiff or from any court any knowledge of the alleged fact that the Smith reissued patent was invalid for the reason alleged or for any other reason, and denies that it was invalid.

(*j*) This Defendant denies that as in said Paragraph 11 of said bill alleged it as aforesaid obtained possession of or secreted
182 or destroyed substantially all or any of the scales manufactured under the Phinney patent, and denies that in pursuance of its alleged design it instituted said suit in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and denies that there were any facts with reference to the prior use of the lightweight skeleton cylinder under the Phinney

patent of which it had any knowledge, and denies that there were any such facts, and denies that said statement from Defendant's bill of complaint quoted, was false or known to its alleged officers to be false, and denies that said allegation was made for the reason alleged, or that it had completely or successfully suppressed or secreted any evidence, or that Plaintiff could not prove the true facts, and denies that the question as to the validity of said reissued patent depended wholly or at all upon the question as to whether any computing scales having a lightweight skeleton cylinder had ever been built or placed in use prior to the issuance of said reissued patent.

(*k*) This Defendant admits the allegations of Paragraph 12 of said bill except that it denies that the counsel for this Defendant had been kept in ignorance of the true facts by this Defendant as aforesaid or otherwise, and denies that certain, or any, officers of The Computing Scale Company as witnesses, or any other witnesses, had full or any knowledge of the manufacture or use of the Phinney scale with a lightweight skeleton construction of cylinder, and denies that there was any such Phinney scale to have knowledge of, and denies that any officers of this Defendant or other of its witnesses testified falsely, but admits that certain witnesses both of Plaintiff and of Defendant testified that they did not know of any usable automatic computing scale prior to the Smith scale, and such was the fact.

(*l*) This Defendant denies that prior to the taking of said testimony in the United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff made most diligent efforts as alleged in Paragraph 13 of said bill, but admits that through the records of the Patent Office Plaintiff could have learned of said Phinney patent, but denies that by reason of any activity of this Defendant, or otherwise, Plaintiff was not able to, or did not, after diligent effort, or any effort on its part, learn of the manufacture, use or existence of any scales made by said Phinney or under the said Phinney patent, and this Defendant alleges that as testified by the investigator of Plaintiff in the plea in this answer above set forth, the Plaintiff made no effort whatever to find whether any scales had been made under the Phinney patent, except that its expert witness, Culmer, testified that he had made a scale under the Phinney patent but that the same would not operate correctly, and this Defendant denies that in pursuance of its alleged fraudulent and malicious design or conspiracy or otherwise or at all it made any arrangement by which any evidence or exhibits were not made a matter of record or were kept secret.

(*m*) This Defendant denies that by reason of any act of
183 this Defendant, fraudulent or otherwise, as set forth in Paragraph 14 of said bill, or at all, the Plaintiff was unable to obtain knowledge or information of the true facts with respect to the manufacture and use of the Phinney scales at any time, and denies that Plaintiff was unable to raise in said suit any issue in the evidence as to the prior manufacture and use of scales under said

Phinney patent with the cylinder alleged or any cylinder, or was unable to offer any evidence contesting the claim of this Defendant but this Defendant alleges that Plaintiff when it did investigate said manufacture and use of Phinney scales had no difficulty whatever in collecting its evidence alleged, and its exhibits of alleged Phinney scales which in January, 1913, it presented to the Circuit Court of Appeals for the Seventh Circuit.

(*n*) This Defendant denies that as alleged in Paragraph 15 of said bill a decree was rendered in said District Court solely or at all as a result of said or any fraudulent practices or conduct upon the part of this Defendant or its alleged co-conspirators, and this Defendant admits that the Plaintiff prosecuted an appeal as alleged, and that said appeal was submitted to said United States Circuit Court of Appeals was alleged.

(*o*) This Defendant admits the allegations of Paragraph 16 of said bill, except that it denies that the alleged lack of evidence existed only or at all because the Plaintiff was deprived by the fraud of this Defendant of the opportunity or evidence to prove any facts alleged or otherwise.

(*p*) This Defendant denies that by reason of the alleged fraudulent conduct, or any fraudulent conduct or at all, the solicitors of Plaintiff as alleged in Paragraph 17 of said bill, were unable to dispute any claims of this Defendant, and denies that the admissions alleged were contrary to the real facts of which this Defendant had knowledge, or which it had suppressed or kept from Plaintiff, or contrary to the real facts in any way, and this Defendant denies that the admission alleged in the petition for a rehearing was untrue, or that any evidence was absent from the record because this Defendant had obtained possession of or otherwise suppressed any evidence or had possession of any evidence at all.

(*q*) This Defendant admits the allegations of Paragraph 18 of said bill.

(*r*) This Defendant denies as alleged in Paragraph 19 of said bill that any evidence was absent from said record by reason of any conduct, fraudulent or otherwise, of this Defendant, or its alleged co-conspirators, and denies that there was any evidence of the character alleged, or that the true facts were as alleged, and denies that the acts of this Defendant in urging upon said Court the validity of said Smith patent upon the ground alleged, or upon any ground, was a fraud or an imposition upon said United States Circuit Court of Appeals, but on the contrary this Defendant alleges that all of the alleged facts discovered by the Plaintiff as to said prior commercial use of said Phinney scale were presented to and urged upon
184 said Circuit Court of Appeals in the affidavits filed by said Plaintiff before said opinion was rendered, and at said time there could not have been, and was not, as the bill of complaint shows, any suppression of any facts now claimed by the Plaintiff regarding said Phinney scale and that after said opinion was

rendered said alleged facts were again presented to said Circuit Court of Appeals as a bill of review of said judgment of said Circuit Court of Appeals and this Defendant' alleges that said presentation was before the decree was rendered which is complained of in this case, either as an interlocutory decree or as a final decree.

(*s*) This Defendant admits the allegations of Paragraph 20 of said bill.

(*t*) This Defendant admits the allegations of Paragraph 21 of said bill, but alleges that the said suit therein mentioned was dismissed because the patent sued upon expired September 3, 1912, and the said action and the infringement complained of did not justify the expense of an accounting.

(*u*) This Defendant denies, for want of information and belief upon said matters, the allegations of the first division of Paragraph 22 of said bill, and this Defendant admits the obtaining of a number of affidavits by said counsel of the Plaintiff and alleges that said affidavits were filed in this cause and that upon said affidavits counsel for Plaintiff moved the Circuit Court of Appeals for leave to dismiss its said appeal as to the said reissued patent, and that this motion was denied by said Circuit Court of Appeals, and this Defendant alleges that said motion was made and denied upon the day of the argument of said appeal in the manner set forth in the plea hereinabove in this answer alleged.

(*v*) This Defendant admits the allegations of Paragraph 23 of said bill except that it denies that Plaintiff did not request said modification of said mandate on the ground that this Defendant had deprived the Plaintiff of the opportunity to present its defense by purchasing and secreting the Phinney scales, but on the contrary this Defendant alleges that the circumstances and facts alleged as to the alleged suppression and secreting of evidence by this Defendant were set forth fully in said affidavits and said claim was then and thereafter made before said Circuit Court of Appeals of such secretion and suppression. This Defendant denies that the Plaintiff had not then discovered what it now claims to be the facts which it claims to show fraudulent acts and suppression of evidence by this Defendant.

(*w*) This Defendant admits the allegations of Paragraph 24 of said bill.

(*x*) This Defendant admits that, as alleged in Paragraph 25 of said bill, before said Master the Plaintiff offered evidence as to the prior manufacture, sale and use of Phinney scales, but denies that it was of a lightweight cylinder, and denies that said Master ruled as alleged in said Paragraph 25, but admits that the Circuit Court of Appeals ruled as alleged. This Defendant denies that Plain-
185 tiff in said proceeding did not present to said Circuit Court of Appeals its alleged evidence with respect to the alleged fraudulent suppression of evidence by this Defendant, but on the

contrary this Defendant alleges that counsel for the Plaintiff in their brief as quoted in the plea in this answer above urged, that the said affidavits showed that this Defendant was seeking to take advantage of its concealment of facts known to it and unknown to the Plaintiff or the Court and its consequent imposition on both the Plaintiff and the Court by reason of the facts stated in said affidavits, and this Defendant denies that Plaintiff had no knowledge of the facts which it now claims as to this Defendant purchasing or secreting or destroying any of said Phinney scales until on or about the 20th day of December, 1921, but on the contrary this Defendant alleges that the facts claimed by Plaintiff to show such suppression and secretion of evidence were known to the Plaintiff on or before the 21st day of January, 1913, and on or before the 14th day of May, 1913, and the same were alleged to be shown by the affidavits filed in said Circuit Court of Appeals on said days last stated, and this Defendant denies that Plaintiff has never had its day in court to present on the merits what it claims to be the true facts with respect to the manufacture, or sale or successful use of computing scales under the Phinney patent, or has had no hearing or opportunity to be heard prior to this time in any court with respect to what it claims to be fraud practiced upon it and upon said District Court and said United States Circuit Court of Appeals, but on the contrary this Defendant alleges that all of said matters have been fully presented to said courts as in the plea in this answer above alleged.

(*y*) This Defendant admits the allegations of Paragraphs 26, 27 and 28 of said bill of complaint except that it denies as alleged in Paragraph 28 of said bill that said judgment was fraudulently obtained by this Defendant.

(*z*) This Defendant is not informed as to the allegations of Paragraph 29 of said bill except by the allegations contained in said Paragraph and it therefore denies the allegations of said Paragraph 29, and upon the same ground this Defendant denies the allegations of Paragraph 30 of said bill.

(*aa*) This Defendant admits, as alleged in Paragraph 31 of said bill, the amount due upon said decree, and as to the other allegations of said Paragraph this Defendant denies the same for want of information and belief, and this Defendant denies that the Plaintiff would lose an amount in excess of $490,000, either all or any part of it, by reason of any fraudulent act or conduct of this Defendant in pursuance of any conspiracy set forth in said bill or any other conspiracy or by any acts or conduct of Defendant or that the Plaintiff will lose any amount of money, and this Defendant alleges that the profits made by Plaintiff by its infringement far exceed the amount of said decree.

(*bb*) This Defendant denies that if this Defendant is not enjoined or restrained from enforcing against Plaintiff and said sureties on said bond the said decree, the Plaintiff will suffer irrep-
186 arable loss or injury, or that Plaintiff would have no remedy at law for the recovery thereof, or that the payment thereof

by Plaintiff will greatly or at all cripple its business operations or curtail its business or would expose Plaintiff to grave or any danger of complete or any ruin and denies that the said Plaintiff has no remedy except in equity and denies that it is entitled to any remedy in equity or at all.

(*cc*) This Defendant denies that it is necessary in order to avoid immediate or irreparable injury or loss or damage resulting to plaintiff before notice can be served or a hearing had that a restraining order issue herein without notice, and this Defendant denies that the Plaintiff is entitled to any restraining order herein or to any temporary or permanent injunction, or to any relief whatever.

Wherefore, the Defendant, The Computing Scale Company, prays to be hence dismissed with its costs.

THE COMPUTING SCALE COMPANY,
By —— ——,
President.

—— ——,
—— ——,
—— ——,
Solicitors and of Counsel for the Computing Scale Company.

STATE OF ILLINOIS,
County of Cook, ss:

Samuel M. Hastings, being duly sworn, upon oath says that he is President of The Computing Scale Company, the Defendant named in the foregoing answer, that he has been such President continuously since the year 1905, that he is a Director of said The Computing Scale Company and has been such Director continuously since the year 1901, that as such President and Director he has been and still is actively engaged in the conduct of the affairs of said The Computing Scale Company, that he has read the foregoing answer and knows the contents thereof, and that the same are true of his own knowledge except as to the matters therein stated to be made on information and belief and as to such matters he believes them to be true.

—— ——.

Subscribed and sworn to before me this — day of January, 1922.

—— ——,
Notary Public.

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EXHIBIT A.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1912, January Session, 1913.

No. 1934.

TOLEDO COMPUTING SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Baker and Kohlsaat, Circuit Judges, and Wright, District Judge.

Appellant (defendant) was adjudged to be an infringer of claims 5 and 6 of reissued patent No. 11,536, April 28, 1896, and of claim 2 of patent No. 579,300, January 11, 1898. Each was issued on application of Albert U. Smith, for improvements in automatic computing scales.

As the scales of complainant and defendant are identical so far as the claims in suit are concerned, the questions to be considered are the patentable novelty of the claimed improvements, the validity of the reissue, and the sufficiency of complainant's proof of title.

Prior art facts of record, which are deemed controlling, are stated in the opinion.

Claims 5 and 6 of the reissued patent are as follows:

"5. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder.

"6. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton disks or frames of thin aluminum having a sheet of paper extending around and secured to their peripheries to form a cylinder."

In applying for the reissue Smith made no changes in the drawings, the descriptions, or the four claims of the original patent, No. 545,616, Sept. 3, 1895. Application for the reissue was made on Jan. 27, 1896, and the desired change consisted in adding claims 5, 6 and 7 to the original claims. Claim 2 of the original (reproduced in the reissue) was the only one that related to the subject-matter of reissue claims 5 and 6, and it reads as follows:

"2. The combination of the indicator-drum constructed of thin skeleton frames of a very light material, the periphery of said drums being formed of a sheet of paper having the divisions of the weight-

scale and other numerals printed thereon, the pinions carried by the shaft of said drum, adjustable conical bearings wherein said shaft is journaled, the cross-bar *c* having a suspending-clip secured thereon, the headed draft-pins supported loosely within the notched ends of the cross-bar *c* after the manner of a stirrup connection, the bow-shaped clips in the ends of the draft-pins, the springs between the coils of which said clips are inserted, whereby the tension on said springs may be altered as described, the draft-rod *k*, the yoke
188 *n*, whereby said rods are connected, the cross-rod *a'* to which the rack-bars are pivoted and whose ends are notched and embrace said draft-rods so as to be capable of sliding thereon, a ring from which the scale-pan is suspended, and suitable adjusting connections between the yoke *n* and said cross-rod *a'*, substantially as described."

Part of the description of Smith's invention as set forth in his original application is in these words:

"The object of my invention is to provide scales of this description which shall be extraordinarily sensitive to weights of small amount and to accurately register the same. A further object of my invention is to provide an adjusting mechanism by the use of which the springs employed may at all times be held at uniform tension, or, in other words, when said springs have become weakened or distorted by long usage the adjusting mechanism may be employed to restore a proper tension to said springs; also, said adjusting mechanism may be used to set the scales at a 'balance' after the weighing-pan is suspended therefrom, and the difference in weight of various kinds of weighing pans may be compensated for by the use of this mechanism."

And in order to accomplish the first of the stated objects of his invention, Smith prescribed:

"It is a very essential feature that the indicator-drum in scales of this nature should be made of very light material, for the reason that if it be not so made the sensitiveness and accuracy of the scales will be more or less affected. For instance, heretofore in scales of this character if a given quantity is weighed successively a number of times it will be found that said scales scarcely ever indicate the weight of said quantity twice exactly the same, there always being some slight variation in the amount registered. This is in a great measure due to the fact that the more the actual weight of the indicator-drum itself the greater must be the force to operate it, and in order to overcome this disadvantage I have constructed a drum of thin skeleton frames of aluminum, while the periphery is formed of a thin sheet of paper pasted to the frames. In this way I have secured a structure that is so light that the force necessary to operate it is almost insignificant."

So far as it needs consideration, the reissue statute reads:

"Sec. 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention and in accordance with the corrected specification, to be issued to the patentee," etc.

Claim 2 of the second patent is this:

"2. In a scale of the character described, the combination with a casing having openings in opposite sides but not opposite each other, of a revoluble drum provided with a series of columns of figures representing dollars and cents and two independent columns of figures representing weights in pounds and ounces, one column of the latter being arranged to be read from the same side of the casing as the figures representing dollars and cents, and the other column of weight-figures being arranged to be read solely through the opening in the opposite side of the casing, the figures representing dollars and cents not being visible from said opposite
189 side, the openings in the opposite sides of the casing being covered with transparent material having stationary pointers thereon adapted to correspond with each other in their indications of figures so that when the pointer on one side indicates one figure in one column, the other pointer on the other side will indicate exactly the same figure in the other column."

Respecting the title, the only difficulty arises in connection with an assignment from the E. C. Smith Company, a corporation, and another assignment of identical character. Signature was as follows:

"THE E. C. SMITH COMPANY.
CHAS. R. LUCE,
Prest.
WILLIAM G. BELL,
Treas."

No corporate seal was affixed. No recital appears that Luce was president and Bell treasurer, or that they as such officers were authorized to execute the assignment in the name and on behalf of the corporation. An acknowledgment, in the following words was attached:

"STATE OF MASSACHUSETTS,
County of Suffolk, ss:

"March 8th, 1899, personally appeared before me the persons known to be Charles R. Luce and William G. Bell, who executed the

above instrument in my presence, and acknowledged the signing of the same to be their voluntary act and deed.

"[SEAL.] C. F. BROWN,
Notary Public."

BAKER, *Circuit Judge,* delivered the opinion of the Court:

In this record the greatest thing is the fact that Smith put in the hands of the world's vendors of commodities the first usable automatic computing scale. Long before Smith's time, and the length of the interval is a fact of considerable weight, the paper art (Phinney's patent No. 106,869 in 1870 and Babcock's No. 421,805 in 1890) had professed to teach practical scale-makers how to build automatic computing scales. But when those disclosures were given material bodies, failure was the result. Just as Smith said in his specification, they would not work twice alike, they were not reliable. To-day in the light of what Smith accomplished it may be easy enough to see exactly where the difficulty lay; but this record proves that during the long interval between Phinney and Smith some of the brightest and most skillful men in the scale business, realizing what a tremendous commercial success was awaiting a reliable automatic computing scale, did not draw from Phinney's patent, nor from elsewhere in the prior art, nor from their own experience as practical mechanics, nor from their own ingenuity, any conception of the necessary means. In the prior art were combinations of indicator-drums and weighing mechanisms. But the cause of their failure might lie at any one of many points. It remained for Smith to discover that the most essential thing in reorganizing the old elements was to make the drum so light that its interference with the weighing operation would be eliminated. And he embodied that conception or "happy thought" in the new means described in the patent and covered by the claims of the first patent in suit. The evidence in this record (and we have considered, though we have not thought it necessary to discuss the remoter references to the non-automatic art) instead of overcoming, has strongly fortified the presumption of invention.

Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course the lessening of weight is a matter of degree; but it is not necessarily merely a matter of degree. If the change converts failure into success, something more
190 than a matter of degree is involved. Unreliable automatic computing scales, in the practical art, are no scales at all. A reliable automatic scale was a new mechanism, a creation, just as in the aspirin case (*Kuehmsted v. Farbenfabriken of Elberfeld Co.,* 179 Fed. 701) this court held that the reduction of the amount of impurities in a compound theretofore known to chemists, whereby a deleterious substance was converted into a valuable medicine, was not merely a change of degree, but was a change of kind, producing a new article of commerce.

A further insistence is made that the patent is void for indefiniteness in this, that the degree of thinness of the aluminum frame and of the paper cylinder are not specified. In the quoted part of the specification Smith substantially told those skilled in the art to

make the skeleton frame to the last degree of thinness that would support the cylinder, and to make the cylinder of the very thinnest paper they could then or thereafter find in the market, which would be stiff enough to retain its shape when attached to the frame. This, its seems to us, was very clear and definite instruction.

It is also contended that the reissue patent was improperly granted. In McDowell v. Ideal Concrete Machinery Co., 187 Fed. 814, this court considered the requirements of the reissue statute, and found that the new claims in that case were invalid because they were not for "the same invention" that was disclosed as the applicant's in his original description. But here the quoted part of the applicant's original description shows that the idea of the light drum, the purpose to be accomplished by it, and the means by which it was to be produced, constituted the principal part of his invention. But it was not covered except in original claim 2, and there only in combination with particularly described weighing mechanism. So, under the original patent, if any one should alter the weighing mechanism, he could avoid claim 2, and thus appropriate the largest part of what Smith had stated to be his invention. Inasmuch as the value of the drum invention as not dependent upon its association with the specific weighing mechanism provided by Smith, he would have been clearly entitled, in our judgment, to have included reissue claims 5 and 6 in his original specification. These claims cover the combination of the Smith "indicator-drum" with any "weighing mechanism" which, with the drum, will produce a practicable automatic weighing scale. Though they are broader than original claim 2, they are not broader than the invention described as Smith's in his original statement of invention. In his application for reissue, made promptly and before any rights of defendant or the public had intervened, he swore that he had not intended to dedicate that principal part of his invention to the public, and that the omission of claims of the character of 5 and 6 had occurred through inadvertence. In our view the Commissioner was warranted in granting the reissue. Compare Topliff v. Topliff, 145 U. S. 156; Houghton v. Whitin Machine Works, 153 Fed. 740; Gaskill v. Meyers, 81 Fed. 854.

It follows that the finding of validity and infringement of the reissue claims was correct.

Claim 2 of the second patent shows that all that Smith contributed to the art, beyond the disclosures of his reissue patent, was to put upon the indicator-drum a column of figures, in inverse order to that of the column already there, so that the purchaser might read the weight through an opening in the back of the casing. If the concept involved had been Smith's there might not be much difficulty in sustaining the claim, however obvious the application of the concept might seem. But the whole idea was old. "Back-indication," by reversing the figures, had long been commonly employed in indicating apparatuses, like cash-registers for example (Pottin's patent No. 312,014 and others); and whatever
191 claim might otherwise have been made for ingenuity in modifying and adapting the old means to an automatic

computing scale is destroyed by referring to the way Smith had already put upon the drum the column of figures to be read by the seller. This claim, we think, is clearly void for lack of invention.

In regard to the acknowledgment of a corporation's conveyance, the Massachusetts statutes (Rev. Laws Mass. 1901, ch. 127, Secs. 17 and 18) required (what is commonly called for in all jurisdictions with which we are familiar) that the notary's certificate should show that the persons who signed as officers were personally known to the notary, that on oath they stated they were such officers and were authorized by the board of directors to execute the instrument and that the corporation either had no seal or that its genuine seal was affixed to the instrument, and that they thereupon acknowledged said instrument to be the free act and deed of the corporation. Execution of the instruments here in question was not proven by testimony. Certified copies of assignments of patents, not duly acknowledged, are not proof of execution. Paine v. Trask, 56 Fed. 233; New York v. Cable Ry. Co., 60 Fed. 1016; National Co. v. Navy Co., 99 Fed. 89. As the acknowledgments of these assignments are insufficient in every respect to constitute good corporate acknowledgments, the record is barren of proof of execution.*

The decree is reversed with the direction to dismiss the bill on the second patent and to permit complainant to introduce proofs of title to the first patent.

*On the sufficiency of the acknowledgments defendant cited: Lumbard v. Aldrich, 6 N. H. 269; Bennett v. Knowles (6 Minn. 4; Lovett v. Saw Mill Association, 6 Paige Ch. (N. Y.) 60; People v. Rochester, N. Y. Sup. Ct. 2 Thomp. & Cook, 142; Malloye v. Coubrough, 96 Cal. 649; Holt v. Trust Co. 11 So. Dak. 456; Endowment Assn. v. Fisher, 71 Md. 430; Clemme v. McLay, 68 Iowa, 158; McChesney v. Brown, 29 Fed. 145. And complainant cited: Tenney v. East Warren Lumber Co. 43 N. H. 343; Banner v. Rosser, 96 Va. 252; Catherine D. Fitch v. Lewiston Steam Mill Company et al. 80 Maine 34; The Frostburg Mut. Bldg. Assn. v. Wm. Brace et al. 51 Md. 508; Ferguson et al. v. Ricketts et al. 55 S. W. 974 (Texas).

192 EXHIBIT B.

Affidavits Filed in United States Circuit Court of Appeals for the Seventh Circuit, May 14, 1913, by Toledo Computing Scale Company.

Affidavits Filed in This Case by Toledo Scale Company.

Affidavit of Henry Theobald.

STATE OF OHIO,
County of Lucas, ss:

Henry Theobald, being first duly sworn, deposes and says as follows:

I am 47 years of age, reside at Toledo, Ohio, and I am the president of Toledo Computing Scale Company, the defendant in the above entitled cause. Prior to becoming president of said company in 1912, I had been for ten years the treasurer and general manager of said company, and as such thoroughly familiar with all of its affairs, including the patent litigation in which it was from time to time engaged.

In the month of March of the year 1907 the complainant in this cause, The Computing Scale Company, brought two suits against the Toledo Computing Scale Company in the United States Circuit Court at Toledo, Ohio, where the home office and place of business of said company are located, alleging infringement of the same patents sued upon in the present cause, to wit, Reissued Letters Patent No. 11,536 and Original Letters Patent No. 597,300. The defendant promptly filed its answers in said suits on May 6, 1907, and they were put at issue by the filing of replications on June 3, 1907. The complainant extensively advertised said suits throughout the United States, in the trade papers and by circulars and letters sent to thousands of purchasers and prospective purchasers of the defendant's sales, but took no steps whatever toward prosecuting either of said suits. It never did, at any time, make any move whatever toward the prosecution of either of said suits, but after they had been pending more than three years, to wit, on May 23, 1910, it brought the present suit in this jurisdiction for alleged infringement of the same patents. The defendant promptly filed its answer in the present suit, and the suit was put at issue by the filing of a replication to said answer on or about August 29, 1910, but complainant took no steps toward prosecuting the suit

until the following March, to wit, on or about March 15, 1911, when it applied to his Honor Judge Kohlsaat for an extension of time for the introduction of proofs, which application was granted upon condition that the complainant forthwith dismiss its aforesaid pending suits at Toledo. This was done and the prosecution of the present case subsequently proceeded with.

At the time the aforesaid suits were brought against the defendant company at Toledo, in the year 1907, I caused what I supposed to be a very thorough investigation of the prior art to be made for defenses to the patents upon which we had been sued. The patent affairs of the defendant company were at that time in the immediate charge of Mr. Allen De Vilbiss, since deceased, who was the inventor of the scales manufactured by the defendant company and was at the head of its inventions and patent department. Mr. De Vilbiss and our patent counsel were instructed to spare no pains or expense in developing all available defenses to the patents upon which we had been sued, and I know that Mr. De Vilbiss made repeated trips to various parts of the country, investigating reported defenses, and that our patent attorneys had repeated investigations of the prior art made both in the Patent Office at Washington and abroad. Still later, after the present suit had been brought in this jurisdiction, we sent a man to New Mexico and to Los Angeles, California, and also to New York and Erie, Pennsylvania, to investigate scales reported to have been manufactured under the Wise patent which is in evidence in the present cause, and concerning which scales proofs were introduced. We also sent a man to Pittsburgh and Beaver Falls and to St. Louis, Missouri, to investigate other reported scales of the prior art. Altogether, the defendant company spent several thousands of dollars in looking up and investigating reported defenses to the patents here in suit, and I believed and still believe that we diligently followed up
193 every clew of which we became possessed, regardless of trouble and expense. We did not, however, learn anything respecting the manufacture of scales under the Phinney patent which is in evidence in this cause, and the first knowledge of said scales which I have ever had, and which

I believe any one connected with the defendant company has ever had, came to us within the past three months, and was then due, I believe, to the wide advertising which the complainant made of the decree which it had secured against the defendant company in the present cause, and to its suits or threatened suits against other alleged infringers of the patents involved therein. Among such suits or threatened suits was one against the Standard Computing Scale Company of Detroit, which company had a sales agent at Providence, Rhode Island, who appears to have had knowledge of some of the old scales manufactured by Phinney at Pawtucket, Rhode Island. The counsel for said company made a trip to Rhode Island to investigate the facts, and upon his return advised my company's counsel of the facts he had learned. I thereupon sent our own counsel to Rhode Island, to further investigate the facts, with the result that he found them to be as reported and secured the affidavits and exhibits which are now laid before the court.

HENRY THEOBALD.

Subscribed and sworn to before me this 14th day of January, 1913.

[SEAL.] D. H. KELLY,
Notary Public, Lucas County, Ohio.

Affidavit of Frank Parker Davis.

STATE OF OHIO,
County of Hamilton, ss:

Frank Parker Davis, of lawful age, being duly sworn deposes and says as follows:

I reside at Evanston, Illinois, and am a member of the law firm of Rector, Hibben, Davis & Macauley, of Chicago, counsel for the defendant in the above entitled cause. I have been familiar with the patents in suit since the year 1907, at which time, in March of said year, the complainant herein brought suit against the defendant for alleged infringement of said patents in the United States Circuit Court at Toledo, Ohio. I have had charge of the defense of the present suit subsequently brought against the defendant at Chicago and I participated in preparing for the defense of said first mentioned suits (there were two of them). There had been made what I believed to be a very thorough and ex-

Affidavit of Frank Parker Davis.

STATE OF ILLINOIS,
County of Cook, ss:

Frank Parker Davis, of lawful age, being duly sworn, deposes and says as follows:

I reside at Evanston, Illinois, and am a member of the law firm of Rector, Hibben, Davis & McCauley, of Chicago, Illinois. I became familiar with the reissued Smith patent No. 11,536 in connection with an infringement suit brought in March, 1907, by the Computing Scale Company of Dayton, Ohio, against Toledo Computing Scale Company in the United States Circuit Court at Toledo, Ohio. I later had charge of the defense of another suit subsequently brought on the same patent against the same defendant in the United States District Court by the same plaintiff at Chicago. I had participated in preparing for the defense of said first-mentioned suit. There had

haustive investigation of the prior art in the Patent Office at Washington, and also careful investigation of various reported instances of prior manufacture, use and sale of scales embodying the patented inventions. The patent affairs of the defendant company were at that time in the immediate charge of Mr. Allen De Vilbiss, the inventor of the defendant's scales, who was then at the head of its inventions and patent department, but is now deceased. I had frequent consultations with Mr. De Vilbiss, in reference to the defense of the suits mentioned, and he was instructed to make a thorough investigation of the prior computing scale art for defenses to the patents in suit. He made repeated trips to various parts of the country upon such work and reported the results of them to me. Subsequently, after the bringing of the present suit at Chicago, and after the death of Mr. De Vilbiss, still further investigations and efforts were made for the purpose of developing defenses to the patents in suit, among other things Mr. De Vilbiss' successor with the defendant company, Mr. John Burkholder, was sent by the defendant, under my direction, to New Mexico and California, New York, Erie, Pennsylvania, Dayton, Ohio, and various other places for the purpose of investigating reported instances of prior manufacture and sale of scales embodying the patented inventions. I also caused renewed investigation of the prior art to be made in the Patent Office at Washington and abroad, and among other things had the old model of the Phinney patent, No. 106,869, looked up in the Patent Office, to ascertain its construction, but found
194 that it was not a full sized working scale, but a very small model, and that its computing drum appeared to be of a solid block of wood. I had no knowledge at any time of any scales having been manufactured under or in accordance with said Phinney patent, by the patentee or anyone else, nor knowledge of anything to suggest or lead me to believe that if any such scales had been constructed they differed in any way from the drawings of said patent. This was true until a period within the past three months at which time I was advised by counsel for the Standard Computing Scale Company at Detroit that he had been informed by an agent of that company located in Rhode

been made what I believed to be a very thorough and exhaustive investigation of the prior art in the Patent Office at Washington, and also careful investigation of various reported instances of prior manufacture, use and sale of scales embodying the patented inventions. The patent affairs of the defendant company were at that time in the immediate charge of Mr. Allen De Vilbiss, the inventor of the defendant's scales, who was then at the head of its Inventions and Patent Department, but is now deceased. I had frequent consultations with Mr. De Vilbiss in reference to the defense of the suits mentioned, and he was instructed to make a thorough investigation of the prior computing scale art for defenses to the patent in suit. He made repeated trips to various parts of the country upon such work and reported the results of them to me. Subsequently after the bringing of the Chicago suit at Chicago, and after the death of Mr. De Vilbiss, still further investigations and efforts were made for the purpose of developing defenses to the patent in suit, among other things, Dr. De Vilbiss' successor with the defendant company, Mr. John Burkholder, was sent by the defendant, under my direction, to New Mexico, and California, New York, Erie, Pennsylvania, Dayton, Ohio, and various other places for the purpose of investigating reported instances of prior manufacture and sale of scales embodying the patented inventions. I also caused renewed investigations of the prior art to be made in the Patent Office at Washington and abroad, and among other things had the old model of the Phinney Patent No. 106,869 looked up in the Patent Office to ascertain its construction, but found that it was not a full-sized working scale, but a very small model, and that its computing drum appeared to be of a solid block of wood. I had no knowledge at any time of any scales having been manufactured or in accordance with said Phinney patent, by the patentee or anyone else, nor knowledge of anything to suggest or lead me to believe that if any such scales had been constructed they differed in any way from the drawing of said patent. This was true until the latter part of the year 1912, at which time I was advised by counsel for the Standard Computing Scale Company at Detroit that he had been informed by an agent of that company located in

Island that there had been some old scales manufactured under the Phinney patent, and that they had very light computing drums whose shells or cylinders were formed of paper. I thereupon went to Rhode Island, to investigate the facts on behalf of the present defendant, and found them to be as reported. I found that William H. Phinney, the patentee, had been dead for some ten years, but I succeeded in finding his son, Thomas Z. Phinney, a man fifty years or more of age, who had been familiar with his father's invention and patent and with the scales manufactured under them, and from whom I secured an affidavit which has been filed in this case. I also learned from him that about ten years ago he and a number of other witnesses familiar with the facts relating to his father's old scales had been examined concerning them on behalf of the defendant in a suit which he believed to have been pending at Philadelphia, and in which, in any event, the defendant was represented by a Mr. Howson, of Philadelphia, and he exhibited to me a receipt which Mr. Howson had given him ten years ago for one of his father's old scales which he had loaned to Mr. Howson for use in said case. Upon investigation I then found that the complainant in the present case had, more than ten years ago, brought suit upon the patents involved in the present case against the Federal Scale Company, at Philadelphia, and that Mr. Phinney (the son) and others had been examined as witnesses in said suit at Pawtucket, Rhode Island, and that the prosecution of said suit had afterward been abandoned. I also learned that the complainant was represented in said suit by Mr. Melville Church, of Washington, D. C., with whom I have been personally acquainted for many years, and whom I know to have been regular eastern counsel for the complainant in this case for more than ten years past.

In the suits against the present defendant at Toledo, above mentioned, the complainant was represented by Messrs. Staley & Bowman of Springfield, Ohio, who to my personal knowledge had been regular western counsel for the complainant for many years, but who have not, so far as I am aware, participated in the prosecution of the present suit against the defendant, which has been in the hands of Chicago counsel.

FRANK PARKER DAVIS.

Rhode Island that there had been some old scales manufactured under the Phinney patent, and that they had very light computing drums whose shells or cylinders were formed of paper. I thereupon went to Rhode Island to investigate the facts on behalf of the defendant, and found them to be as reported. I found that William H. Phinney, the patentee, had been dead for some ten years, but I succeeded in finding his son, Thomas Z. Phinney, a man 50 years or more of age, who had been familiar with his father's invention and patent and with the scales manufactured under them. I also learned from him that about ten years before he and a number of other witnesses familiar with the facts relating to his father's old scales had been examined concerning them on behalf of the defendant in a suit which he believed to have been pending at Philadelphia, and in which, in any event, the defendant was represented by a Mr. Howson, of Philadelphia, and he exhibited to me a receipt which Mr. Howson had given him ten years before for one of his father's old scales which he had loaned to Mr. Howson for use in said case. Upon investigation I then found that The Computing Scale Company had, more than ten years before, brought suit upon the patents involved in the present case against the Federal Scale Company, at Philadelphia, and that Mr. Phinney (the son) and others had been examined as witnesses in said suit in Pawtucket, Rhode Island, and that the prosecution of said suit had afterward been abandoned. I also learned that the complainant was represented in said suit by Mr. Melville Church, of Washington, D. C., with whom I had been personally acquainted for many years, and whom I knew to have been regular eastern counsel for the complainant in this case for more than ten years past.

In the suit against the Toledo Computing Scale Company at Toledo above mentioned, the complainant was represented by Messrs. Staley & Bowman of Springfield, Ohio, who to my personal knowledge had been regular western counsel for the complainant for many years, but who had not, so far as I was aware, participated in the prosecution of the suit against said Toledo Company at Chicago, which suit had been in the hands of Chicago counsel.

Subscribed and sworn to before me this 14th day of January, 1913.
[SEAL.] ALBERT C. ROSS,
Notary Public,
Hamilton County, Ohio.

I visited a number of places of business in Pawtucket and Providence, but found no Phinney scale. I knew nothing about efforts that had been made by representatives of The Computing Scale Company to gather up all such scales. My present recollection is that the only Phinney scale I saw was one Thomas Z. Phinney had at his residence in Providence and this scale did not contain a paper drum but a metal one.

FRANK PARKER DAVIS.

Subscribed and sworn to before me this 6th day of January, 1922.
[SEAL.] ROBERT DOBBERMAN,
Notary Public.

135 *Affidavit of Harry B. Sherwood.*

STATE OF ILLINOIS,
County of Cook, ss:

Harry B. Sherwood, being duly sworn, deposes and says as follows:

I am forty-four years of age, reside at Kansas City, Missouri, and am vice president and secretary of the Kansas City Computing Scale Company (originally the Kansas City Scale and Supply Company), manufacturers of computing scales.

My home was formerly at Saugatuck, Connecticut, where I lived from the time I was an infant until I was upwards of thirty years of age, removing from Saugatuck about the year 1901, under the circumstances hereinafter related. I have known Albert U. Smith and Edmond C. Smith, named as inventor and assignee, respectively, in reissued letters patent of the United States No. 11,536 of April 28, 1896, ever since my boyhood. When I was a small boy Albert U. Smith lived at Saugatuck, Connecticut, and I knew him at that time. Later he removed to Seymour, Connecticut, some thirty or forty miles from Saugatuck, and still later moved back to Saugatuck. Edmond C. Smith was an uncle of Albert U. Smith, and was a manufacturer of shoe and rope machinery, with a factory located at Saugatuck. His residence address is given in the above mentioned patent as Westport, Connecticut, which is practically the same town as Saugatuck. About the year 1886 I went to work for Edmond C. Smith, in his shoe and rope machinery factory, and with the exception of part of one year remained continuously in his employ,

Affidavit of Harry B. Sherwood.

STATE OF CONNECTICUT,
County of Fairfield, ss:

Harry B. Sherwood, having been sworn, deposes and says as follows:

I am fifty-three years of age and a resident of Saugatuck, Connecticut. My home was for many years at Saugatuck, where I lived from the time I was an infant until I was upwards of thirty years of age, removing from Saugatuck about the year 1901 when I became connected with a company known as The Columbian Automatic Computing Scale Company at Washington, D. C. I was connected with the manufacture of their scales at Philadelphia and later at Bridgeport, Connecticut. Later I was vice president and secretary of the Kansas City Computing Scale Company, manufacturing computing scales at Kansas City, Missouri, and later was manager of the Independent Scale Company, manufacturing scales at Asheville, North Carolina. I returned to Saugatuck about two years ago.

I have known Albert U. Smith, and Edmond C. Smith named as inventor and assignee, respectively, in reissued letters patent of the United States No. 11,536, of April 28, 1896, ever since my boyhood. When I was a small boy Albert U. Smith lived at Saugatuck, Connecticut, and I knew him at that time. Later he removed to Seymour, Connecticut, some thirty or forty miles from Saugatuck, and still later moved back to Saugatuck. Edmond C. Smith was an uncle of Albert U. Smith, and was a manufacturer of shoe and rope machinery with a factory located at

and in that of his successors in business, for some fifteen years.

In 1894 or 1895 Mr. Edmond C. Smith, who had by that time largely abandoned the manufacture of shoe and rope machinery previously carried on by him, but who was a man of means, became interested in a computing scale which his nephew, Albert U. Smith, had gotten up at Seymour, Connecticut, and a few of which had been built and sold or introduced into use at Seymour. Arrangements were made between the two Smiths by which the manufacture of these scales was transferred to Saugatuck, and placed in charge there of A. U. Smith and myself in the old factory of E. C. Smith. The manufacture of the scales was carried on there for several years, first under the name of E. C. Smith & Co. and then under that of the E. C. Smith Company, after which the business was sold to the Boston Computing Scale Company, and shortly thereafter was sold by that company to the Computing Scale Company of Dayton, Ohio.

The scales which A. U. Smith had manufactured at Seymour, and perhaps some of the early ones manufactured at Saugatuck, had metal name plates affixed to them bearing the words "The Daisy Computing Scale. Pat. Feb. 18, 1890," the patent date referring to the Babcock patent, No. 421,805, of February 18, 1890, under which Mr. Smith had some sort of a license or royalty arrangement. I still have one of such old name plates in my possession, among various computing scale relics which I have preserved, and submit it with this affidavit marked "Defendant's Exhibit Smith Name Plate." The later scales manufactured by the Smiths at Saugatuck were called the "Acme." The Smith scales were all similar to that illustrated and described in the Smith patent heretofore mentioned, various improvements being added from time to time.

The manufacture of the Smith scales continued to be carried on at the Saugatuck factory after the sale of the business to the Boston Computing Scale Company, and after its further sale by that company to the Dayton Company, and I remained at the Saugatuck factory, in the employ of the Dayton Company, until late in the year 1900 or early in the year 1901, at which time I became connected with a company, known as the Columbian Automatic Computing Scale Company, Saugatuck. His residence address is given in the above-mentioned patent as Westport, Connecticut, which is practically the same town as Saugatuck. About the year 1886 I went to work for Edmond C. Smith in his shoe and rope machinery factory, and with the exception of part of one year remained continuously in his employ, and in that of his successors in business, for some fifteen years.

In 1894 or 1895 Mr. Edmond C. Smith, who had by that time largely abandoned the manufacture of shoe and rope machinery previously carried on by him, but was a man of means, became interested in a computing scale which his nephew, Albert U. Smith, had gotten up at Seymour, Connecticut, and a few of which had been built and sold or introduced into use at Seymour. Arrangements were made between the two Smiths by which the manufacture of these scales was transferred to Saugatuck, and placed in charge there of A. U. Smith and myself in the old factory of E. C. Smith. The manufacture of the scales were carried on there for several years, first under the name of E. C. Smith & Co. and then under that of the E. C. Smith Company, after which the business was sold to the Boston Computing Scale Company, and shortly thereafter was sold by that company to the Computing Scale Company of Dayton, Ohio. The Smith scales were all similar to that illustrated and described in the Smith patent heretofore mentioned, various improvements being added from time to time.

The manufacture of the Smith scales continued to be carried on at the Saugatuck factory after the sale of the business to the Boston Computing Scale Company, and after its further sale by that company to the Dayton Company, and I remained at the Saugatuck factory, in the employ of the Dayton Company, until late in the year 1900 or early in the year 1901, at which time I became connected with a company known as the Columbian Automatic Computing Scale Company, which was organized by some gentlemen at Washington, D. C., to exploit a computing scale gotten up and patented by a man named Christopher. I was placed in charge of the manufacture of the scales, including the establishment of a factory, which was finally located at Philadelphia, and the manufacture of the scales begun

which was organized by some gentlemen at Washington, D. C., to exploit a computing scale gotten up and patented by a man named Christopher. I was placed in charge of the manufacture of the scales, including the establishment of a factory, which was finally located at Philadelphia, and the manufacture of the scales begun there, but later on transferred to Bridgeport, Connecticut. In addition
196 to the company above mentioned, which had been organized for the manufacture of the Christopher scale (and whose name was subsequently changed to that of Automatic Computing Scale Company), there was a selling company organized under the name of the Federal Scale Company, and this company undertook the marketing of the scales. Shortly after the scales were placed upon the market this latter company was sued, in the United States court at Philadelphia, by the Computing Scale Company, of Dayton, Ohio, for infringement of the Smith Reissued Patent No. 11,536 heretofore referred to, and I assisted the company's attorneys in preparing for the defense of the case. I was familiar with the fact that one William H. Phinney, of Pawtucket, Rhode Island, had manufactured some computing scales at an early date, which had light cylinders or drums composed of paper shells and wooden end pieces or heads mounted on a rotary shaft or spindle. One of these Phinney scales had been discovered by a salesman of the Smith scales, in a store or market at Pawtucket, Rhode Island, soon after the Smith scales were placed upon the market, in 1894 or 1895, and had been brought by him to the Smith factory at Saugatuck, where I had seen and examined it at that time. I told the attorneys who were defending the suit against the Federal Scale Company about this old Phinney scale, and they sent a man to Rhode Island to make an investigation, with the result that they secured several similar scales of Phinney's manufacture, which had long been in use there, and they were introduced in evidence and a number of witnesses examined respecting them, after which the suit was abandoned by the Dayton company.

I repeatedly saw these old Phinney scales in the possession of Messrs. Howson & Howson, attorneys for the Federal Scale Company at Philadelphia. They were all quite similar to there, but later on transferred to Bridgeport, Connecticut. In addition to the company above mentioned, which had organized for the manufacture of the Christopher scale (and whose name was subsequently changed to that of Automatic Computing Scale Company) there was a selling company organized under the name of the Federal Scale Company, and this company undertook the marketing of the scales. Shortly after the scales were placed upon the market this latter company was sued, in the United States Court at Philadelphia, by the Computing Scale Company, of Dayton, Ohio, for infringement of the Smith reissued patent, No. 11,536, heretofore referrtd to, and I assisted the company's attorneys in preparing for the defense of the case. I was familiar with the fact that one William H. Phinney of Pawtucket, Rhode Island, had manufactured some computing scales at an early date, which had light cylinders or drums composed of paper shells and wooden end pieces or heads, consisting of a hub mounted on a rotary shaft, a rim on which the paper shell was secured and spokes connecting the hub and rim. I knew of these Phinney scales because one of them had been discovered by one of the early salesmen of the Smith scales, whose name I believe was Wallace, in a store or market at Pawtucket, Rhode Island, soon after the Smith scales were placed on the market in 1894 or 1895. This scale had been brought by him to the Smith factory at Saugatuck, where it remained for a number of years, and where I had seen it and examined it. I told the attorneys for the Federal Scale Company about this old Phinney scale, and they sent a man to Rhode Island to make an investigation, with the result that they secured several similar scales of Phinney's manufacture which had long been in use there. These scales were introduced in evidence in this suit and a number of witnesses examined respecting them, after which the suit was abandoned by the Dayton Company. The last I knew of these several Phinney scales they were in the possession of Messrs. Howson and Howson, attorneys for the Federal Scale Company at Philadelphia. They were all similar to the old Phinney scale which I had seen at Saugatuck, although differing somewhat in details from it and from each other. The old Phinney scale which I saw at Sauga-

the old Phinney scale which I had seen at Saugatuck, although differing somewhat in details from it and from each other. The old Phinney scale which I saw at Saugatuck had a wooden case and was substantially identical in appearance with that shown in the circular marked "Defendant's Exhibit Phinney Circular" attached to the affidavit of Thomas Z. Phinney in this case. It was arranged to rest on a shelf, which was provided with a hole through which the depending rod or bar carrying the hook for the suspension of the scale pan extended, as shown in said circular. Others of said old Phinney scales had metal casings, and were substantially identical in appearance with that shown in the cut attached to the affidavit of William M. Raymond in this case. All of them were provided with light drums or cylinders composed of paper shells and wooden end pieces or heads substantially identical with the drum or cylinder shown in the cut attached to Mr. Raymond's affidavit above mentioned. The scales were of various sizes, as I recall them, with drums or cylinders of corresponding sizes, and they all operated in the manner disclosed in the Phinney patent, No. 106,869, of August 30, 1870.

HARRY B. SHERWOOD.

Subscribed and sworn to before me this 12th day of May, 1913.

[SEAL.] ROBERT DABLEN,
Notary Public.

tuck had a wooden case and was substantially identical in appearance with that marked "Phinney Exhibit Scale." It was arranged to rest on a shelf, which was provided with a hole through which the depending rod or bar carrying the hook for the suspension of the scale pan extended. Others of said Phinney scales had metal outer casings and the entire scale was adapted to be suspended from a hook extending from the ceiling or wall. All of them were provided with light drums or cylinders composed of paper shells and wooden end pieces or heads substantially identical with the drum or cylinder of the old Phinney scale which I examined at Saugatuck. The scales were of various sizes, as I recall them, with drums or cylinders of corresponding sizes, and they all operated in the manner disclosed in the Phinney Patent No. 106,869 of August 30, 1870.

The scale of Phinney's manufacture to which I referred above was still at the factory in Saugatuck when I left there in 1901. After the purchase of the Smith patents by the Computing Scale Company of Dayton, Ohio, the officials of the Dayton Company often visited the factory at Saugatuck, where they were freely admitted about the plant.

About November, 1912, I was requested by Mr. Pagelsen, attorney for The Standard Computing Company of Detroit to visit Saugatuck and other places in Connecticut and Rhode Island in an endeavor to locate one of the old Phinney scales, about which I had told him a short time before. I had been back to Saugatuck on various occasions since leaving the employ of the Smith factory, and remembered that on one such visit I had seen at the Smith factory one of these old Phinney scales, along with samples of various other computing scales, in the storeroom at the factory. I at first could not leave my business in Kansas City to make the eastern trip, but a little later my mother, who had been living in Saugatuck died, and I agreed to endeavor to find an old Phinney scale for Mr. Pagelsen on the same trip home. While in Saugatuck I visited the Smith factory late in 1912, but the old Phinney scale to which I refer was no longer there. I also inquired about Pawtucket, Rhode Island, and adjacent towns, but was unsuccessful in my effort to locate an old Phinney scale at that time. The

Smith scales were no longer being manufactured at Saugatuck and I was informed that the old scales had all been removed when the manufacture of the Smith scales was transferred to Dayton, Ohio.

HARRY B. SHERWOOD.

Sworn to before me this 30th day of December, 1921.

[SEAL.] SAML. PURDY,
Notary Public.

197 *Affidavit of Ralph B. Evans.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Ralph B. Evans, of lawful age, being duly sworn, deposes and says as follows:

I reside at Philadelphia and I am an attorney at law. Within the past ten days I have, at the request of Edward Rector of Chicago, Illinois, examined the docket and files of the United States Circuit Court of the Eastern District of Pennsylvania, for the purpose of ascertaining what they might disclose with respect to a suit for infringement of certain letters patent reported to have been filed in said court about the year 1901 by The Computing Scale System of Dayton, Ohio, against the Federal Scale Company, of Philadelphia. Upon examining the docket and files of said Court, pursuant to said request, I found that such a suit was brought in said court as of October sessions, 1901, No. 12, on October 5, 1901, alleging infringement of certain letters patent to the United States, including Reissued Letters Patent No. 11,536, dated April 28, 1896, and Original Letters Patent No. 597,300, dated January 11, 1898, and praying an injunction and an accounting of profits and damages against the defendant. An answer was filed in said suit on or about December 16, 1901, setting up, among other defenses, Letters Patent of United States No. 106,869, granted August 30, 1870, to William H. Phinney, and also an alleged prior invention and use by the said Phinney of scales embodying the inventions of the patents sued upon. Replication was filed to said answer, but no proofs were ever filed in the cause, and so far as the records of the court show it was abandoned without any prosecution. The bill of complaint

Affidavit of Ralph B. Evans.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Ralph B. Evans, being duly sworn, deposes and says as follows:

I reside at Wynnewood, Penna., and I am attorney at law with offices at 1335 Land Title Building, Philadelphia, Penna. During the month of January, 1913, I searched, at the request of Edward Rector of Chicago, Illinois, the docket and files of the United States Circuit Court for the Eastern District of Pennsylvania for the history of a suit for infringement of certain letters patent reported to have been filed in the said court about the year 1901 by The Computing Scale System of Dayton, Ohio, against the Federal Scale Company, of Philadelphia. The files and docket disclosed that such a suit was brought in the said court as of October sessions, 1901, No. 12, on October 5, 1901, alleging infringement of certain letters patent to the United States, including reissued letters patent, No. 11,536, dated April 28, 1896, and original Letters Patent No. 597,300, dated January 11, 1898, and praying an injunction and an accounting of profits and damages against the defendant. An answer was filed in said suit on or about December 16, 1901, setting up, among other defenses, letters patent of United States, No. 106,869, granted August 30, 1870, to William H. Phinney, and also alleging a prior invention and use by the said Phinney of scales embodying the inventions of the patents sued upon. A replication thereto was filed, but no proofs were ever filed and at the time of the search in 1913 so far as the records of the court showed, the cause was abandoned without any prosecution. In December of 1921 I made a further

was signed by Messrs. Church and Church, of Washington, D. C., as solicitors and counsel for complainant, and the answer by Mr. E. Miller Jackson of Washington, D. C., and Mr. Charles Howson of Philadelphia, as solicitors and counsel for defendant.

Upon calling at the office of Mr. Charles Howson in Philadelphia and making further inquiry about the suit in question I was informed by him that by stipulation between counsel the proofs and exhibits were not filed of record, but were left in the custody of the counsel for the party on whose behalf they were presented. I examined the proofs taken on behalf of the defendant, the original of which are still in the possession of Mr. Charles Howson. Among the defendant's proofs are depositions of William H. Phinney, Elma Owen Phinney, John H. Devlin, Thomas E. Phinney, William H. Gillan, Daniel H. Horton and Myra Phinney, taken before Waldo W. Robinson, 210 Main street, Pawtucket, Rhode Island, between May 2 and May 10, 1902. The record shows that the complainant was represented at the taking of their depositions by Mr. Melville Church, of Washington, D. C. and defendant by Messrs. Howson and Howson, of Philadelphia. These depositions show the manufacture and sale by Phinney of certain scales, manufactured under his patent above mentioned, and three of these scales were produced and introduced in evidence.

I was informed by Mr. Howson that subsequent to the taking of these depositions the exhibits were turned over to Mr. Church, in whose custody they have been until within the past ten days, when they were returned to Mr. Howson at the latter's request. Mr. Howson further stated that after the taking of the depositions above referred to the complainant took the deposition of one witness, not, however, bearing upon this effect of the old Phinney scales, but relating
198 to another defense, and that since that time no further proceedings have been taken in the case, although to the best of his knowledge no settlement was ever effected.

RALPH B. EVANS.

Sworn and subscribed to before me this 15th day of January, 1913.

CHARLES J. McDERMOTT,
[SEAL.] *Notary Public.*

examination of the files and docket of the said court and found that a decree dismissing the bill of complaint was entered of record on February 14, 1913.

The bill of complaint was signed by Church & Church, of Washington, D. C., as solicitors and counsel for complainant, and the answer by Mr. E. Miller Jackson, of Washington, D. C., and Mr. Charles Howson of Philadelphia, as solicitors and counsel for defendant.

Further inquiry at the office of Mr. Charles Howson in Philadelphia about the suit in question revealed that by stipulation between counsel the proofs and exhibits were not filed of record, but were left in the custody of the counsel for the party on whose behalf they were presented. I examined the proofs taken on behalf of defendant in the original. Among them were depositions of William H. Phinney, Elma Owen Phinney, John H. Devlin, Thomas E. Phinney, William H. Gillan, Daniel H. Horton and Myra Phinney, taken before Waldo W. Robinson, 210 Main street, Pawtucket, Rhode Island, between May 2, and May 10, 1902. The record shows that the complainant was represented at the taking of their depositions by Mr. Melville Church of Washington, D. C., and defendant by Messrs. Howson and Howson of Philadelphia. These depositions show the manufacture and sale by Phinney of certain scales, manufactured under his patent above mentioned, and three of these scales were produced and introduced in evidence. I was informed that subsequent to the taking of these depositions the exhibits were turned over to Mr. Church in whose custody they remained until they were returned to Mr. Howson at the latter's request on or about January 10, 1913. After the taking of these depositions the complainant took the depositions of one witness, not, however, bearing upon the defense of the old Phinney scales, but relating to another defense.

Within the past ten days I have examined the same files and docket for the purpose of ascertaining the history of a suit for the infringement of certain letters patent by The Computing Scale Company of Dayton, Ohio, against Richard T. Randall, doing business under the name and style of R. T. Randall & Co. The suit was brought as of April Term, 1901, No. 63, on August 6, 1901, alleging infringe-

ment of certain letters patent to the United States, including re.ssued letters patent, No. 11,536, dated April 28, 1896, and original Letters Patent No. 597,300, dated January 11, 1898, and original Letters Patent No. 674,883, dated May 28, 1901, and praying an injunction and an accounting of profits and damages against the defendant. An answer was filed in said suit October 18, 1901, setting up among other defenses, letters patent of United States, No. 106,869. granted August 30, 1870, to William H. Phinney, and also alleging a prior invention and use by the said Phinney of scales embodying the inventions of the patents sued upon. A replication was filed November 16, 1901. So far as the records now show the cause was abandoned without any prosecution.

The bill of complaint was signed by Messrs. Church & Church of Washington, D. C., as solicitors and counsel for complainant, and the answer by Mr. John P. Bartlett, of Messrs. Mitchell, Bartlett & Brownell, of New York City, as solicitors and counsel for defendant.

RALPH B. EVANS.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Sworn to and subscribed before me this 24 day of December, A. D. 1921.

GEORGE D. WOLBERT,
[SEAL.] *Notary Public.*

Affidavit of Thomas Z. Phinney.

STATE OF RHODE ISLAND,
County of Providence, ss:

Thomas Z. Phinney, being duly sworn, says as follows:

I am fifty-two years old, and the son of William H. Phinney, of Pawtucket, R. I., patentee of Patent No. 106,869, dated August 30, 1870, for "Scale for Showing Weight and Price." My father died in August, 1902; about ten years prior to his death, he turned over to me a business he had been conducting for some twenty years, which consisted in the manufacture and sale of weighing and computing scales, corresponding substantially with the construction shown in said patent. The manufacture of these scales was carried on during that period, and for some considerable time subsequent

Affidavit of Thomas Z. Phinney.

STATE OF NEW JERSEY,
County of Essex, ss:

Thomas Z. Phinney, being duly sworn, deposes and says as follows:

I am sixty years old and reside at 90 Rose terrace, in Newark, New Jersey. My father, William H. Phinney, was the patentee and inventor of the subject matter of Patent No. 106,869, dated August 30, 1870, for "Scale for showing weight and price." My father died in August, 1902; about ten years prior to his death he turned over to me a business which he had been conducting for some twenty years, which consisted in the manufacture and sale of computing scales corresponding substantially with the disclosure of the patent aforesaid. The manufacture of these scales was

thereto, when he had turned the business over to me, in a shop at the rear of my father's home in Pawtucket, R. I. I had assisted my father in the assembling of the scales during the period of twenty years referred to, and I have personal knowledge and a clear recollection of the make-up of the scales which were assembled in that shop during said period, and also with reference to the exhibition of those scales at various places, and the sale of several of them, to storekeepers and provision vendors, who regularly used them in weighing and computing values of the commodities in which they dealt.

I have in my possession the original full sized scale which my father built and from which the drawings of his said patent were made. This original scale corresponds precisely with the construction illustrated in said patent. It has a wooden casing and contains a pair of drums or cylinders of hollow metal, with paper charts pasted over their cylindrical portions. I recall the model which was sent to the Patent Office,—a duplicate of which is now in the possession of my mother —and has drums or cylinders of solid wood. This form of drum or
190 cylinder was not followed in any of the scales which my father or I built for sale, neither was the hollow metal form of cylinder followed in any but a very few of those scales. For the purpose of securing lightness of the drums and increased sensitiveness of the scales, my father adopted a form of drum which consisted in heads or end discs of comparatively thin wood cut out in skeleton or spider form, and a cylindrical shell of paper without any metallic or wood backing, except as the marginal portions of the shell embraced the edges of the heads or end discs, to which the shell was glued. Some of the scales which were made by my father had wooden casings, but the most of them had cast-iron casings.

The scale marked for identification "Phinney Exhibit Sample Scale" is just such a scale as my father manufactured in considerable quantity during a period of twenty years heretofore referred to. In fact, this exhibit scale was assembled by me out of parts which my father turned over to me when I succeeded to the business more than twenty years ago. I assembled this exhibit scale about ten years ago. The occasion for my doing so was that the only complete carried on during that period, and for some time subsequent thereto, while I conducted the business, in a shop in the rear of my father's home in Pawtucket, R. I. I had assisted my father in the assembling of the scales during the period of twenty years referred to and I have personal knowledge and a clear recollection of the make-up of the scales assembled in that shop during said period, and also with reference to the exhibition of these scales at various places, and the sale of several of them to storekeepers and provision vendors, who regularly used them in weighing and computing the values of the commodities in which they dealt.

I have in my possession the original full-sized scale which my father built and from which the drawings of his said patent were made. This original scale corresponds precisely with the drawings illustrating said patent. It had a wooden casing and contains a pair of drums or cylinders of hollow metal, with paper charts pasted over their cylindrical portions. I recall the model which was sent to the Patent Office—a duplicate of which was for a long time in the possession of my mother, and has drums or cylinders of solid wood. This form of drum or cylinder was not followed in any of the scales which my father or I built for sale. The hollow metal form of cylinder was used in but a very few of such scales. In the majority of the scales built by my father and in all of them built by myself we used a form of drum which consisted of making end discs of thin wood cut out in spider form—having an outer rim and central hub connected together by spaced radial spokes. A cylindrical shell of paper without any metallic or wood backing, was glued onto the peripheries of the end discs. This made the drums or cylinders very light. In some of the scales my father used a casing of metal—either brass or iron—but in most of them we used a wooden casing shaped something like the old mantel clocks with two pigeonholes in the front face to hold the account books of the grocers or butchers using the scale. This wood casing was oblong and housed the cylinders as well as the spring of the scale. The pan on which the meat or vegetables were placed hung below the bottom of the wooden casing. The casing rested on two brackets extending from the wall and the pan hung down below them.

working scale of this type which I then had and which I had been regularly employing in my business of manufacturing and selling pop corn cakes, was loaned by me to one Charles Howson, a Philadelphia lawyer, who borrowed it for an indefinite period to use in connection with some patent litigation. I assembled the exhibit scale for use in my above mentioned business in place of the scale I loaned Mr. Howson. This scale which I loaned Mr. Howson corresponds in all essential respects with the exhibit scale, though I recall it had a casing which was made of sheet brass. It had just the same sort of indicating drums that are in the exhibit scale. I had assembled this scale with the brass casing more than twenty years ago.

The cast-iron casing of the exhibit scale is composed of the cast-iron patterns which were used from time to time during the twenty years' period prior to my succeeding to my father's business, for the casting of other iron casings which were used for scales that he made and sold.

After succeeding to my father's scale business I did not make or have made for me any parts for scales, but I did assemble out of the parts which my father turned over to me as many as three complete scales which I sold. I still have in my possession a considerable number of the scale parts which were turned over to me more than twenty years ago by my father, and these include several complete indicating drums, each composed of skeleton end discs or heads of wood, and have a cylindrical shell of paper. The drum marked for identification "Phinney Exhibit Original Drum" is one of the drums turned over to me by my father more than twenty years ago, and the others that I have in my possession are just like it. My recollection is that this exhibit drum was originally part of the scale which my father sold to one Raymond, a butcher who traveled about selling meats from a cart. I recall the use of the scale by said Raymond more than thirty years ago, and I recall the circumstance that the scale was broken through some accident and Raymond brought it to my father's shop and procured another. Raymond is still living and resides in South Attleboro, Mass.

Others I recall who purchased and used scales made by my father were

The scale marked for identification "Phinney Exhibit Scale" is just such a scale as my father manufactured in considerable numbers during a period of twenty years heretofore referred to, and by myself after I took over the business. This scale is the same one as was referred to by me in a deposition taken February 21, 1917, and was therein referred to as "Providence Exhibit No. 3." This scale was in use for a great many years in the town of Pawtucket, R. I. It was often tested and sealed by the Sealer of Weights and Measures. On the side of the scale appears a label "Town of Pawtucket, R. I., John H. Potter, Town Sealer, sealed Jan. 9, 1880." This particular scale was also referred to in a deposition taken in the suit brought in 1901 against the Federal Scale Company. This scale as well as certain other exhibit scales was turned over to Messrs. Howson & Howson, patent lawyers of Philadelphia, Pa., who informed me that the scales were later sent to Washington, D. C., to the attorney for The Computing Scale Company of Dayton, Ohio, Messrs. Church & Church. In the year 1913 I was requested by Mr. Edward N. Pagelsen, attorney for the Standard Computing Scale Company of Detroit, Mich., to locate a few of the old Phinney scales as well as some of the users of such scales. In company with Mr. Marcus C. Shurtleff, the Standard agent at Providence, R. I., I visited quite a number of the old users of Phinney scales in Providence, Pawtucket, Attleboro, Central Falls and adjacent towns. We learned that practically all of the old scales that had been in actual use had disappeared. Several of the old users informed us that they had been approached some ten years before by a representative of The Computing Scale Company of Dayton, Ohio, who had offered to buy any of the old Phinney scales which they could learn of. Only one scale was found in Mr. Shurtleff's, and in my search in 1913 that had been in actual use for many years, and this one had been retained only after the owner had refused repeated offers of purchase from the representative of the Dayton Scale Company. The owner of this scale was Mr. Tierney (now deceased) and I have now repurchased the scale from him and have same in my possession.

When we were unable to locate a number of Phinney scales around

John H. Devlin and Daniel Horton, both of whom dealt in meats, provisions and groceries in the City of Pawtucket, R. I., prior to the year 1880, and prior thereto used said scales for weighing and computing commodities in which they dealt.

I have examined a diary kept by my father and find therein notation of sale of a scale to said Horton October 29, 1878, and also an entry dated August 20, 1873, which refers to installing a scale in Devlin's market. I also found in said diary notation of a scale sent to England in 1873, through one J. Hill, also a notation of a trip to Providence in 1874 to sell scales, also notation of the sale of a scale January 1, 1881, to Dexter's market in Providence, R. I., and a sale January 8, 1881, to 223 Cranston street, Providence, R. I., without name of proprietor. I also find in my father's diary notations concerning various exhibitions of the scale at business places and fairs and the awarding of a diploma by New England Fair, December 16, 1873.

I recall the advertising circular which my father distributed and several of which have been preserved, one of the same being attached hereto, and marked for identification, "Defendant's Exhibit Phinney's Circular." This has been in my possession for upwards of thirty years, and illustrates a form of casing which differs slightly from that of most of the scales which he made and sold. I recall that he preferred the style of casing which the "Phinney Exhibit Sample Scale" has, the casing of the latter, as before stated, having generally served as a pattern from which to cast casings for other scales.

I recall that all of these scales which were made by my father for exhibition at business places and fairs and for sale were constructed upon identically the same principle as the scale illustrated in my father's patent and practically all of them had indicating drums composed of skeleton wood heads and paper cylindrical shells the same as "Phinney Exhibit Original Drum" and the drums in "Phinney Exhibit Sample Scale." I recall that my father adopted this construction of drum at an early period and all the drums he turned over to me more than twenty years ago were of this description.

I further recall that the scales which my father sold were regularly Providence and Pawtucket, I remembered the old depositions taken by Howson & Howson in 1901, and wrote to him asking for the return of the exhibit scales then used. Mr. Howson sent me back the exhibit scales after some delay, explaining that they had been in the custody of the counsel for The Computing Scale Company of Dayton, and he had been unable to return them until they had been sent to him from Washington a few days before. The scale referred to in this affidavit "Phinney Exhibit Scale" was one of the scales returned by Messrs. Howson & Howson. I also have a number of the drums or cylinders such as are used in these scales, one of which I note has been marked for identification "Phinney Exhibit Original Drum." My recollection is that this exhibit drum was originally part of the scale which my father sold to one Raymond, a butcher, who traveled about selling meats from a cart. I recall the use of this scale by said Raymond more than forty years ago, and I recall the circumstance that the scale was broken through some accident and Raymond brought it to my father's shop and procured another. I still have in my possession a number of such complete indicating drums, each composed of skeleton or spider end discs, of wood, surrounded by a cylindrical shell of paper. I had a considerable number of parts of scales turned over to me by my father, and from these parts I assembled a number of scales which I sold.

Scales like the scale marked "Phinney Exhibit Scale" were used regularly by Mr. Devlin, Mr. John H. Devlin, his son, Mr. Daniel Horton, Mr. Tierney and Mr. Raymond. There were many others sold and used whose names I do not remember. Mr. Devlin, Sr., had a store on Pleasant street, Pawtucket, and Mr. Devlin, Jr., a store on River street, Pawtucket. Mr. Tierney's store was on Middle street and Mr. Horton's store was on Pine street, and I believe on Main street for a while. Mr. Raymond lived in Attleboro, Mass.

I have examined a diary kept by my father and find therein notation of sale of a scale to said Horton October 29, 1878, and an entry referring to installing a scale in Devlin's market August 20, 1873. There are also notations of a scale sent to England, 1873, through one J. Hill, also a notation of a trip to Providence in 1874 to sell

sealed, i. e., tested for accuracy and sensitiveness by the official sealer of weights and measures of the City of Pawtucket, R. I.

I was a boy when my father's business in these scales started, but my familiarity with the enterprise dates back to that time. His shop was on the premises of our home and the various members of the family were in and out of the shop constantly and greatly interested in the work that was going on there, and we all assisted my father in it, and I continued to assist my father right along for many years and I traveled about with him frequently when he was exhibiting and endeavoring to sell his scales, and I was identified with him in his business from the time it started up to the time when he turned it over to me.

The three scales I before mentioned as having been assembled by me out of parts turned over to me by my father were sold one at a time to the same individual, whose identity I do not know. Some fifteen years ago he first applied for a scale, representing to me that he was from Connecticut and desired the scale for the use of the Grocers' and Butchers' Association of Connecticut. About a year after I sold this individual a scale (which scale was substantially identical with Phinneys Exhibit Sample Scale), he appeared again and I sold him a second scale of this same kind. Upon this occasion I recall that I asked him if he hadn't taken the first scale up to Boston and used it in connection with the business of the Boston Computing Scale Co. He admitted that he had some connection with that company, but stated that he was out of it and wanted another scale to use in some other connection. I sold him one and he returned again about a year later and I sold him a third scale. This was the last scale I disposed of to the best of my recollection up to the time about ten years ago, when I loaned Mr. Howson the scale that I had kept for my own use as aforesaid. I have never seen this latter scale since that time, and I still hold the receipt given me by Mr. Howson dated April 2, 1902.

I have recently made repeated efforts to locate one of the scales which were put in regular use at places of business where my father sold them, but I have been unable to locate a single one of them. I believe they scales; also notation of a scale sold to Dexter's market in Providence on January 1, 1881, and the sale on January 8, 1881, at 223 Cranston street, Providence, without name of proprietor. I also found in my father's diary notations concerning various exhibitions of the Phinney scale at business places and fairs and the awarding of a diploma at the New England Fair, December 16, 1873.

I recall advertising circulars which my father distributed and several of which have been preserved, one of the same being attached hereto and marked for identification "Phinney Exhibit Circular." This has been in my possession for upwards of forty years, and illustrates a form of casing which differs slightly from that of most of the scales which he made and sold. I recall that he preferred the style of casing which the scale "Phinney Exhibit Scale" utilizes.

I recall that all of these scales which were made by my father for exhibition at business places and fairs and for sale were constructed upon identically the same principle as the scale illustrated in my father's patent, though practically all of them had indicating drums or cylinders composed of skeleton or spider wooden discs and cylindrical shells of paper, the same as "Phinney Exhibit Original Drum" and the drums in "Phinney Exhibit Scale." I recall that my father adopted this construction of drum at an early period and all the drums he turned over to me more than twenty years ago were of this description.

I further recall that the scales which my father sold were regularly sealed, i. e., tested for accuracy and sensitiveness by the Official Sealer of Weights and Measures of the City of Pawtucket, R. I.

I was a boy when my father's business in these scales started, but my familiarity with the enterprise dates back to that time. His shop was on the premises of our home and the various members of the family were in and out of the shop constantly and greatly interested in the work that was going on there. We all assisted my father in such work, and I continued to assist him for many years, traveling about with him frequently when he was exhibiting and endeavoring to sell his scales. During the later years of his life his hearing became quite poor, and I accompanied him particularly to act as ears for him. In this way I was identified with him in

were all gathered up some ten years ago in connection with the same litigation with reference to which I loaned Mr. Howson my scale, for I recall seeing in Mr. Howson's possession a dry goods box containing a collection of scales and scale parts which I recognized as those of my father's manufacture. This was at a time when my mother, my wife and myself and, I think, John H. Devlin, son of the aforesaid John Devlin, and William H. Gillan were called to testify in the litigation. I have no knowledge as to the outcome of that litigation, though I do recall that upon the occasion when the aforesaid testimony was taken, one of the attorneys remarked to me that the case would never come to trial. I do not recall who the parties to that litigation were, though I retain an impression that there were Dayton, Ohio, and Philadelphia, Pa., and New Britain, Conn., concerns involved in it.

THOMAS Z. PHINNEY.

Subscribed and sworn to before me at Providence, R. I., this 2nd day of January, 1913.

JAMES H. THURSTON,
[SEAL.] *Notary Public.*

his business almost from the time it started.

From among the parts turned over to me by my father, I assembled three scales, which were sold one at a time to the same individual, whose identity I do not know. Some 24 or 25 years ago he first sought me out and asked me to make him up a scale, representing to me that he was from Connecticut and desired the scale for the uses of the "Grocers and Butchers Association of Connecticut." About a year after that I sold the same individual another scale, upon his solicitation and request. Upon this occasion I recall that I asked him if he hadn't taken the first scale up to Boston and used it in connection with the business of the Boston Computing Scale Company. He admitted that he had some connection with that company, but said he was out of it at that time and wanted another scale to use in some other connection. He returned again about a year later and I sold him a third scale. This was the last scale I disposed of to the best of my recollection up to the time in 1902 when I loaned Mr. Howson the scales referred to in my depositions taken at that time. I still hold the receipt given me by Mr. Howson, dated April 2, 1902, for the scales which I loaned him. These scales were returned to me only after I had written to Mr. Howson for them in 1913, as before stated.

Since 1913 I have made repeated efforts to locate the scales which were put in regular use at places of business where my father sold them, but with the exception of the scale used by Mr. Tierney, I have been unable to find any of them. I received the impression from talking with the old users that all of their scales were gathered up many years before in connection with some litigation.

THOMAS Z. PHINNEY.

Subscribed and sworn to before me this 17th day of December, 1921.

RICHARD HAEBERLE,
[SEAL.] *Notary Public.*

Affidavit of Albert U. Smith.

STATE OF CONNECTICUT,
County of Fairfield, ss:

Albert U. Smith, having been sworn, deposes and says as follows:

That he is sixty-two years old and a

resident of Saugatuck, Connecticut, where he has been residing for upward of forty years. That about the year 1894 he became interested in computing scales and manufactured, in his own factory at Saugatuck, computing scales of his invention, which scales he afterwards manufactured for the Computing Scale Company of Dayton, Ohio. He continued manufacturing computing scales for the Dayton Company at his Saugatuck factory until shortly after the death of Mr. O. O. Ozias in 1910. That during the time he was so manufacturing scales for the Dayton Company he was often visited in Saugatuck by the officials and head men of the Dayton Company, he remembering particularly of having been frequently visited by Mr. Ozias, and less frequent visits by Mr. Canby, Mr. James and Mr. Ludlow. These gentlemen were freely admitted to the Saugatuck factory, which at one time employed nineteen men and manufactured about forty scales a day.

In the early days of computing scales—just when he does not remember—he learned of what was known as Phinney scales, a small cylinder computing scale made up in Pawtucket, Rhode Island. He does not believe that very many of these scales were ever made, and does not know where it would be possible to locate one of them today, unless it is at the factory of the Dayton Scale Company. The reason why he thinks it would be impossible to locate an old Phinney scale in use to-day is that several years ago—while he was still manufacturing scales for the Dayton Company in Saugatuck—the officials of the Dayton Company made a long continued search in an effort to locate some Phinney scales then in use. As far as he now remembers, they succeeded in locating only two Phinney scales, one of which was in his factory at Saugatuck for many years, and the other of which was sent to the factory at Dayton. Later, at the request of the Dayton Company he shipped to them the Phinney scale in his factory. He does not remember who made the search for the Dayton Company for the Phinney scales, but believes it was either Mr. Koehne, the patent lawyer at Dayton, or Mr. Stewart an assistant in the firm of Church & Church, patent lawyers of Washington, D. C. He remembers that the search was conducted throughout Providence, Pawtucket and near-by towns in Rhode

Island. He does not believe that the Dayton Company now has any Phinney scales at their factory, for they were sent to the Dayton factory before the time of their fire. He thinks they were probably destroyed in such fire.

ALBERT U. SMITH.

Subscribed and sworn to before me, this 20th day of December, 1921.

[SEAL.] SAML. A. PURDY,
Notary Public.

Affidavit of Marcus C. Shurtleff.

STATE OF RHODE ISLAND,
County of Providence, ss:

Marcus C. Shurtleff, being sworn, deposes and says as follows:

I am forty-four years of age and reside at 117 Thayer street, Providence, R. I. I have been a resident of Providence for about twenty years and for the last eleven years have been the Providence representative for the Standard Computing Scale Co.

About November, 1912, I was asked by my company to make a search for old Phinney scales, and accompanied Mr. Thomas Z. Phinney to a number of stores where Phinney scales had been in use. Also we visited many people who had at one time used Phinney scales, but who were now out of business. We found it impossible to locate more than one old Phinney scale that had been used in weighing meats and groceries because the old users informed us that many years before—probably some ten years before—the representatives of the Dayton Scale Co.—their name being The Computing Scale Co. of Dayton, Ohio—had made visits throughout this section endeavoring to purchase the old Phinney scales wherever they could find them. The one scale that we found was kept by the old user only after he had repeatedly refused to sell the scale to the representatives of the Dayton Company.

Mr. Phinney later sold me one of the scales which he himself had and I in turn transferred it to the Standard Computing Scale Co.

MARCUS C. SHURTLEFF.

Subscribed and sworn to before me this 16th day of December, 1921.

EDW. D. O'CONNELL,
[SEAL.] *Notary Public.*

Affidavit of Edward N. Pagelsen.

STATE OF ILLINOIS,
County of Cook, ss:

Edward N. Pagelsen, of lawful age, being duly sworn, deposes and says as follows:

I res de at Detroit, Michigan, am an attorney at law making a specialty of patent cases, and as such am attorney and counsel for The Standard Computing Scale Company, Ltd., of Detroit, a concern engaged in the manufacture and sale of computing scales. On or about May 15, 1911, said company was sued at Milwaukee, Wisconsin, where it has an agency, by The Computing Scale Company, of Dayton, Ohio, for alleged infringement of Reissued Letters Patent No. 11,536 and Original Letters Patent No. 597,300, covering the inventions of Albert U. Smith in computing scales, and I was employed by The Standard Company to defend the suit. Said suit is still pending and I have continuously had charge of it on behalf of the defendant. I originally filed a plea questioning the jurisdiction of the court, upon which plea issue was joined and testi-
260 mony taken. The question was submitted to his Honor, Judge Sanborn, on briefs, and after being held under advisement for a considerable time the plea was overruled, and thereafter, in July, 1912, I filed an answer to the bill, in which I set up all of the prior art defenses of which I had been able to learn. About the first of the following November, before any proofs had been taken in the case, I learned by accident that there was a man at Kansas City, Missouri, who claimed to have knowledge of some very old computing scales having paper drums or cylinders. I went at once to Kansas City, and located the man in question, who proved to be Mr. H. B. Sherwood, vice president of the Kansas City Computing Scale Company. Mr. Sherwood told me that he had formerly lived at Saugatuck, Connecticut, and had been in the employ there of the E. C. Smith Company, manufacturers, among other things, of computing scales. He further told me that while so in the employ of the E. C. Smith Company, some fifteen years prior to the date of our conversation, said E. C. Smith Company had in its possession, in a collection of various old computing scales, several computing scales having paper drums or cylinders which

Affidavit of Edward N. Pagelsen.

STATE OF MICHIGAN,
County of Wayne, ss:

Edward N. Pagelsen, of lawful age, being duly sworn, deposes and says as follows:

I reside at Detroit, Michigan. Am an attorney at law, making a specialty of patent cases, and as such am attorney and counsel for The Standard Computing Scale Company, Ltd., of Detroit, a concern engaged in the manufacture and sale of computing scales. On or about May 15, 1911, said company was sued at Milwaukee, Wisconsin, where it has an agency, by The Computing Scale Company, of Dayton, Ohio, for alleged infringement of reissued letters patent, No. 11,536, and original letters patent, No. 597,300, covering the inventions of Albert U. Smith in computing scales. I was employed by The Standard Company to defend the suit, and continuously had charge of it on behalf of the defendant during its entire pendency. I originally filed a plea questioning the jurisdiction of the court, upon which plea issue was joined and testimony taken. The question was submitted to his Honor, Judge Sanborn, on briefs, and after being held under advisement for a considerable time the plea was overruled. We thereupon deposited a bond of $25,000 in order to avoid the issuance of a preliminary injunction. Thereafter, in July, 1912, I filed an answer to the bill, in which I set up all of the prior art defenses of which I had been able to learn. About the first of the following November, before any proofs had been taken in the case, I learned by accident that there was a man at Kansas City, Missouri, who claimed to have knowledge of some very old computing scales having paper drums or cylinders. I went at once to Kansas City, and located the man in question, who proved to be Mr. H. B. Sherwood, vice president of the Kansas City Computing Scale Company. Mr. Sherwood told me that he had formerly lived at Saugatuck, Connecticut, and had been in the employ there of the E. C. Smith Company, manufacturers, among other things, of computing scales. He further told me that while so in their employ, the E. C. Smith Company had in its possession, in a collection of various old computing scales, several computing scales having paper drums

had been manufactured by a man named Phinney somewhere in Rhode Island. Mr. Sherwood further said that he had been back and forth to Saugatuck on various occasions since leaving the employ of the E. C. Smith Company, and that on one occasion he had visited their factory and had seen these old Phinney scales stored away, along with samples of various other old computing scales, in the storeroom in the factory. He thought the scales in question were still there at the time of his conversation with me, and that he could readily secure them by going to Saugatuck. Upon my return to Detroit I consulted with my clients and secured their authority to have Mr. Sherwood go to Connecticut at their expense and endeavor to locate and secure the scales in question. I thereupon wired Mr. Sherwood at Kansas City and requested him to go to Saugatuck. He replied that he could not go immediately on account of his business at Kansas City, but a few days later wired me again stating that his mother, who lived in Saugatuck, had just died and that he would go on there at once. He returned to Kansas City by way of Detroit, and informed me that the E. C. Smith Company had gone out of business and that the old scales had all been removed from the place in their factory where he had last seen them, and could not be found.

After this unsuccessful effort to locate the old Phinney scales I had my client instruct its New England agency to have its salesmen, and particularly the one located in Rhode Island, make a search for any living members of the Phinney family. A week or two later we received word from my client's Rhode Island salesman, Mr. M. C. Shurtliff, stating that he had located a son of Mr. Phinney, the patentee of the scales in question, who was residing in Providence and had in his possession one of the old scales manufactured by his father, together with parts of others. I at once went to Providence and saw the said Phinney, and a number of other people who were familiar with the old scales, including the widow of the patentee Phinney, a woman upwards of eighty years of age, who stated to me that her husband had been dead some ten years. I secured affidavits from a number of persons familiar with the old scales, and also procured a sample scale and one of the paper drums or cylinders from another old scale, and

or cylinders which had been manufactured by a man named Phinney somewhere in Rhode Island. Mr. Sherwood further said that he had been back and forth to Saugatuck on various occasions since leaving the employ of the E. C. Smith Company, and that on one occasion he had visited their factory and had seen these old Phinney scales stored away, along with samples of various other old computing scales, in the storeroom in the factory. He thought the scales in question were still there at the time of his conversation with me, and that he could readily secure them by going to Saugatuck. Upon my return to Detroit I consulted with my clients and secured their authority to have Mr. Sherwood go to Connecticut at their expense and endeavor to locate and secure the scales in question. I thereupon wired Mr. Sherwood at Kansas City and requested him to go to Saugatuck. He replied that he could not go immediately on account of his business at Kansas City, but a few days later wired me again stating that his mother, who lived in Saugatuck had just died and that he would go there at once. He returned to Kansas City by way of Detroit, and informed me that the E. C. Smith Company had gone out of business and that the old scales had all been removed from the place in their factory where he had last seen them, and could not be found.

After this unsuccessful effort to locate the old Phinney scales I had my client instruct its New England agency to have its salesmen, and particularly the one located at Rhode Island, make a search for any living members of the Phinney family. A week or two later we received word from my client's Rhode Island salesman, Mr. M. C. Shurtliff, stating that he had located a son of Mr. Phinney, the patentee of the scales in question, who was residing in Providence and had in his possession one of the old scales manufactured by his father, together with parts of others. I at once went to Providence and saw the said Phinney, and a number of other people who were familiar with the old scales, including the widow of the patentee Phinney, a woman upwards of eighty years of age, who stated to me that her husband had been dead some ten years. I secured affidavits from a number of persons familiar with the old scales, and also procured a sample scale and one of the paper drums or

returned to Detroit. Shortly afterward I reported the information I had secured to counsel representing the Toledo Computing Scale Company for use in the suit which was pending against that company upon the same patents as those upon which my client had been sued.

EDWARD N. PAGELSEN.

Subscribed and sworn to before me this 5th day of May, 1913.

ROBERT DOBBERMAN,
[SEAL.] *Notary Public, Cook County, Illinois.*

cylinders from another old scale, and returned to Detroit. Shortly afterward I reported the information I had secured to counsel representing the Toledo Computing Scale Company for use in the suit which was pending against that company upon the same patents as those upon which my client had been sued. My knowledge and possession of the scales manufactured by Phinney became known to the attorneys of The Computing Scale Company, and little, if any, objection was made by them to the reduction of the bond from $25.000 to $5,000 on my motion. Shortly thereafter and after the decision in the case of Computing Scale Company v. Toledo Computing Scale Company was affirmed by the Court of Appeals of the Seventh Circuit, the suit against the Standard Computing Scale Company was withdrawn, the plaintiff paying the court costs, without any testimony on the merits and without any hearing.

Prior to learning by mere chance of the information which Mr. Sherwood, of Kansas City, was reported to have respecting some old computing scales having drums or cylinders made of paper, I had no knowledge that any scales of any kind had ever been manufactured under the Phinney patent nor any reason to suppose or believe that if any such scales had been manufactured they had departed in any way from the disclosure of the patent. I had been familiar with the Phinney patent for a number of years, in connection with my work for The Standard Computing Scale Company, having been attorney for that company for some four years, and having been continuously engaged in its behalf during that period in litigation over computing scale patents. I was fairly familiar with the computing scale art, and particularly with spring drum computing scales, but there was nothing about the Phinney patent to lead me to suppose or believe that, if any computing scales had been manufactured under the patent, their computing drums or cylinders had been formed of paper. On the contrary, the drawings of the patent indicated that such drum or cylinder was made of some other material, such as sheet metal, for the reason that each drum or cylinder was shown in the drawings of the patent as being composed of a single continuous and integral sheet of material, of uniform thickness, formed or shaped up into a drum or

cylinder, and when I met Mr. Phinney, the son at Providence, I learned from him that some of the old scales manufactured by his father had in fact been provided with sheet metal drums or cylinders, and that he still had one of such old scales in his possession, and I was subsequently informed that it was from this old metal cylinder scale that the drawings and application for his father's patent had been prepared.

EDWARD N. PAGELSEN.

Subscribed and sworn to before me this 7th day of January 1922.

ELEANOR GARDNER,
[SEAL.] *Notary Public,*
Wayne County, Mich.

My commission expires February 18, 1923.

204 *Affidavit of William H. Gillan.*

STATE OF RHODE ISLAND,
County of Providence, ss:

William H. Gillan, being duly sworn, says as follows:

I am 44 years of age, and a resident of Pawtucket, R. I., I am the proprietor of the meat and provision store located at 78 River street, Pawtucket, R. I. I bought this business from John H. Devlin, about twelve years ago. I had worked as an employee of Devlin in said store for about 17 years, and before that as an employee of John H. Devlin, who was the proprietor of the store. I recall that during the time I was working in that store and fully twenty-five years ago there was regularly employed in the weighing and computing of values of means and provisions, a scale which was known as Phinney's scale. I used this repeatedly myself, and continued to do so up to about ten years ago, when some person whose identity I do not now recall purchased the scale from John H. Devlin. I recall this incident, however, as connected in some way with litigation, and I think the person who bought the scale from Devlin was one of the attorneys who took part in the taking of some testimony about that time. I was one of the witnesses and I remember that beside the scale I had turned over to said attorney, there were a number of others in his possession, all of the same make, that is, Phinney scales.

During the time I worked in Devlin's and Fallon's store, and was my-

Affidavit of William H. Gillan.

STATE OF RHODE ISLAND,
County of Providence, ss:

William H. Gillan, being duly sworn, says as follows:

I am 52 years of age, and a resident of Pawtucket, R. I., and reside at 145 West avenue, Pawtucket, R. I. I am the proprietor of the meat and provision store located at 78 River street, Pawtucket, R. I. I bought this business from John H. Devlin about twelve years ago. I had worked as an employee of Devlin in said store for about seventeen years, and before that as an employee of John H. Devlin, who was the proprietor of the store. I recall that during the time I was working in that store and fully twenty-five years ago there was regularly employed in the weighing and computing of values of meats and provisions, a scale which was known as Phinney's scale. I used this repeatedly myself and continued to do so up to about ten years ago, when some person whose identity I do not now recall purchased the scale from John H. Devlin. I recall this incident, however, as connected in some way with litigation, and I think the person who bought the scale from Devlin was one of the attorneys who took part in the taking of some testimony about that time. I was one of the witnesses and I remember that besides the scale I had turned over to said attorney there were a number of others in his possession, all of the same make, that is, Phinney scales.

self the proprietor of that store, I became very familiar with the Phinney scale in use there, both through my frequent use of it and through examination of its interior construction. It corresponded in all essential respects with Phinney's Exhibit Sample Scale, the only difference that I can recall being that it had a wooden casing
205 of somewhat different design, instead of the iron casing of the exhibit scale. It had identically the same arrangement of a horizontal sight opening or slot across the front of the casing, and there were price per lb. numerals marked along this slot on the casing. The casing also bore the name William H. Phinney, and the date of his patent. There was in this scale the same arrangement as in the exhibit scale of a spring in the upper part of the casing and a bar suspended from the spring and cut with gear teeth, which engaged a gear wheel. Furthermore, the construction was identical with that of the exhibit scale with respect to the location of that gear wheel between the drums. The drums and the gear wheel were fastened together as in the exhibit scale, so that when goods were placed upon the pan which hung from the lower end of the bar, the drums would turn within the casing, and weight and value numerals would be exhibited through the slot of the casing. I had occasion more than once to inspect the interior mechanism of the scale so used in Devlin's and afterwards Fallon's, and later my store, and I recall distinctly *that* the indicating drums and wooden hubs which were fastened upon a metal rod that was held between bearings on the casing, the same as in the exhibit scale. I further recall that each of these drums was identical in construction with the "Phinney Exhibit Original Drum," in that each was composed of skeleton end discs or heads of wood and a cylindrical shell of paper.

WILLIAM H. GILLAN.

Subscribed and sworn to before me at Pawtucket, R. I., this 2nd day of January, A. D. 1913.

[SEAL.] FELIX F. THURM,
Notary Public.

During the time I worked in Devlin's store, and was myself proprietor of that store, I became very familiar with the Phinney scale in use there, both through my frequent use of it and through examination of its interior construction. It corresponded in all essential respects with Phinney's Exhibit Sample Scale, the only difference that I can recall being that it had a wooden casing of somewhat different design, instead of the iron casing of the exhibit scale. It had identically the same arrangement of a horizontal sight opening or slot across the front of the casing, and there were price per lb. numerals marked along this slot on the casing. The casing also bore the name William H. Phinney, and the date of his patent. There was in this scale the same arrangement as in the exhibit scale of a spring in the upper part of the casing and a bar suspended from the spring and cut with gear teeth, which engaged a gear wheel. Furthermore, the construction was identical with that of the exhibit scale with respect to the location of that gear wheel between the drums. The drums and the gear wheel were fastened together as in the exhibit scale, so that when goods were placed upon the pan which hung from the lower end of the bar, the drums would turn within the casing, and weight and value numerals would be exhibited through the slot of the casing. I had occasion more than once to inspect the interior mechanism of the scale so used in Devlin's and later my store, and I recall distinctly *that* the indicating drums and wooden hubs which were fastened upon a metal rod that was held between bearings on the casing, the same as in the exhibit scale. I further recall that each of these drums was identical in construction with the "Phinney Exhibit Original Drum," in that each was composed of skeleton end disks or heads of wood and a cylindrical shell of paper.

WILLIAM H. GILLAN.

Subscribed and sworn to before me at Pawtucket, R. I., this 15th day of December, 1921.

BENJAMIN J. DYER,
[SEAL.] *Notary Public.*

Affidavit of Joseph McNally.

STATE OF RHODE ISLAND,
County of Providence, ss:

Joseph McNally, being duly sworn, deposes and says as follows:

I am fifty-one years of age and reside at 48 West Cole street, Pawtucket, R. I. I was clerk in the grocery and butcher market of Mr. John H. Arnold at Pawtucket avenue and Waldo street, Pawtucket, about thirty-three years ago. I remained in the employ of Mr. Arnold about seventeen months. During that time there were two scales in his store, one a bar platform scale and the other a Phinney scale similar to the Phinney Exhibit Scale. That scale had a wooden casing resting on two brackets with the pan hanging below the brackets. Mr. Arnold sold the market to Mr. William H. Andrews, and about eight or nine months later I bought out the market. The Phinney scale was in the market when I bought it. I used it every day for many years. This scale was inspected by Mr. James Crawford, Sealer of Weights and Measures at Pawtucket.

I remember that it was about thirty-one years ago, just before Christmas that I bought out the meat market mentioned above. I fixed this date in my mind because it was about two years before I was married, and I was married twenty-nine years ago.

JOSEPH McNALLY.

Subscribed and sworn to before me at Pawtucket, R. I., this 16th day of December, 1921.

BENJAMIN J. DYER,
[SEAL.] *Notary Public.*

206 *Affidavit of John H. Devlin.*

STATE OF RHODE ISLAND,
County of Providence, ss:

John H. Devlin, being duly sworn, says as follows:

I am 67 years of age, a resident of Pawtucket, R. I., and a son of John Devlin, who died some 12 years ago. He had operated a meat and provision market at 78 River street, Pawtucket, R. I. I succeeded him as proprietor of this shop about 26 years ago, having previously assisted my father in carrying on the business. I remember that there was in use in the store at

Affidavit of John H. Devlin.

STATE OF RHODE ISLAND,
County of Providence, ss:

John H. Devlin, being duly sworn deposes and says as follows:

I am seventy-five years of age and reside at 85 Beechwood avenue, Pawtucket, R. I., and am the son of John Devlin, who, in 1869 and following years, kept a meat market at 18 Pleasant street, Pawtucket, and who later kept a similar business at 78 River street, Pawtucket. I was about twenty-four years old when I first began to help my father in his shop

he time I succeeded my father, a eighing and computing scale known s the Phinney scale, and similar in ake-up and mode of operation to "Phinney Exhibit Sample Scale." I emember that the casing was wood nd somewhat different in design from hat of exhibit scale, but in all other espects it was substantially identical herewith. I used this scale regularly the business for a period of 10 ears, for weighing and computing the alues of various commodities, then I old the business to Frank Mitchell.

JOHN H. DEVLIN.

Subscribed and sworn to before me t Pawtucket, R. I., this 2nd day of January, A. D. 1913.

[SEAL.] FELIX F. THURM,
Notary Public.

on Pleasant street, and he then had a Phinney scale similar to the Phinney Exhibit Scale. The scale my father used had a wooden case with two pigeonholes in it to receive account books. The scale stood on two brackets with the pan hanging below the brackets. My father started business at 78 River street in 1885 but the scale was in use for several years ahead of that. I, myself, used that scale for ten years, finding it very convenient for weighing meat, vegetables, etc., because it gave the pounds and ounces and also the price. It was very accurate. That scale was inspected by the Sealer of Weights and Measures, of Pawtucket, R. I., every year, sometimes twice a year.

I, myself, purchased a scale from Mr. Phinney later, when I succeeded my father in business at 18 Pleasant street. At one time I had two Phinney scales in use. The second scale was identical with the first. I used this scale for a great many years, something like twenty-five or twenty-six years. I found it very accurate, and it gave accurate weight and price. The name of the sealer at Pawtucket was Mr. James Crawford. I also knew Mr. John H. Potter who was Town Sealer before Mr. Crawford. Mr. Crawford inspected the second scale I mentioned above and sealed it. When I closed my business at 78 River street, I sold out to my nephew, Mr. William H. Gillan, who had been working for me at that store for sixteen or seventeen years.

I saw advertisements put out by Mr. Phinney promoting the sale of his scales.

JOHN H. DEVLIN. [SEAL.]

Subscribed and sworn to before me at Pawtucket, R. I., this 19th day of December, 1921.

[SEAL.] BENJAMIN J. DYER,
Notary Public.

Affidavit of Daniel C. Fallon.

STATE OF RHODE ISLAND,
County of Providence, ss:

Daniel C. Fallon, being duly sworn, deposes and says as follows:

I am sixty-six years of age and reside at 34 Potter street, Pawtucket, R. I. I am now in the coal business and have been since 1889. Before that I was in the meat business for four or five years, being in partnership with Mr. McDuff on Pleasant street,

Pawtucket. We had three scales in our store, one of them a Phinney scale similar to the Phinney Exhibit Scale. It had a wooden case resting on two brackets with a pan hanging below the casing. We kept that scale over the meat counter and used it particularly for weighing corned beef. I used it myself every day during the several years we ran the business. The Sealer of Weights and Measures used to come around about once a year and inspect the scale, putting test weights on it and then sealing it, that is, putting his seal on it. He never missed a year.

I purchased the scale with the store business from Mr. Frank Mitchell. I do not remember the exact year we took over this business. We ran the store, however, for four or five years and sold out in 1888 to Mr. Adolphus Davis. I can fix this year because I was married then, and remember that I sold out in the same year. The next year I went in the coal business, and I have looked up to verify when it was I started in the coal business. It was in the year 1889.

DANIEL C. FALLON.

Subscribed and sworn to before me at Pawtucket, R. I., this 16th day of December, 1921.

CHARLES E. CONLEY.
[SEAL.] *Notary Public.*

207 *Affidavit of E. Willard Horton.*

STATE OF RHODE ISLAND,
County of Providence, ss:

E. Willard Horton, being duly sworn, deposes and says as follows:

I am fifty-three years old and reside at 26 Allen avenue, City of Pawtucket, County of Providence and State of Rhode Island. I was a neighbor and very friendly with Thomas Z. Phinney, son of William H. Phinney, of said Pawtucket, and was constantly running back and forth from my home to Mr. Phinney's shop where he formerly made the Phinney self-reckoning scale, so called, in U. S. Patent No. 106,869, issued August 30, 1870. I was very much interested in watching the making of these scales so that I remember distinctly how they were made. I remember that some of the first had wooden casings, but that the rest had an iron casing. The drums on which the figures which gave the weight and the amount of purchase

Affidavit of E. Willard Horton.

STATE OF RHODE ISLAND,
County of Providence, ss:

E. Willard Horton, being duly sworn, deposes and says as follows:

I am sixty-one years old, and reside at 12 (32 Exchange street) Manchester street, City of Pawtucket, County of Providence, and State of Rhode Island. I was a neighbor and very friendly with Thomas Z. Phinney, son of William H. Phinney, of said Pawtucket, and was constantly running back and forth from my home to Mr. Phinney's shop where he formerly made the Phinney self-reckoning scale, so called in U. S. Patent No. 106,869, issued August 30, 1870. I was very much interested in watching the making of these scales so that I remember distinctly how they were made. I remember that some of the first had wooden casings, but that the rest had an iron casing. The drums on which the figures which gave the

were printed, were made of wood and metal ends having holes through them and the paper tube with the figures was pasted on these wooden ends. The drum was moounted to revolve in the casing.

I distinctly remember of diplomas being awarded to Mr. Phinney at different fairs where he had exhibited his self-reckoning scales. I also recollect him selling scales constructed as above set forth to Daniel Horton, of Pawtucket, R. I., and that the scale was in constant use for a long time in Horton's store on Pine street. Mr. Horton died a few months ago. I know that Mr. Phinney also sold one of these scales to John H. Devlin on River street, Pawtucket, R. I., who also used this scale in his market.

E. WILLARD HORTON.

Subscribed and sworn to before me at Pawtucket, R. I., this 2nd day of January, 1913.

[SEAL.] FELIX F. THURM,
Notary Public.

weight and the amount of purchase were printed, were made of wood and metal ends having holes through them and the paper tube with the figures was pasted on these wooden ends. The drum was mounted to revolve in the casing.

I distinctly remember of diplomas being awarded to Mr. Phinney at different fairs where he had exhibited his self-reckoning scales. I also recollect him selling scales constructed as above set forth to Daniel Horton of Pawtucket, R. I., and that the scale was in constant use for a long time in Horton's store at Pine street. Mr. Horton died a few months ago. I know that Mr. Phinney also sold one of these scales to John H. Devlin on River street, Providence, R. I., who also used this scale in his market.

E. WILLARD HORTON.

Subscribed and sworn to before me at Pawtucket, R. I., this 15th day of December, 1921.

[SEAL.] BENJAMIN J. DYER,
Notary Public.

Affidavit of Charles H. Tierney.

STATE OF RHODE ISLAND,
County of Providence, ss:

Charles H. Tierney, being duly sworn, deposes and says the following:

I am forty-nine years of age and live at 65 Park street, Pawtucket, R. I. My father, Mr. Patrick Tierney, is now dead, but for many years kept a meat market at 310 Middle street, Pawtucket, My father started his meat business over thirty years ago, and I helped him in the market from the time that I was old enough to be of service. He and I used a Phinney scale in the shop on Middle street, and also in the meat market on Central street, Central Falls, R. I. He also ran a meat cart at one time. The scale we used was similar to the Phinney Exhibit Scale, having a wooden casing with two pigeonholes for the reception of account books and a pan hanging below the casing. I do not remember any particular seal on our scale, but I do remember of the sealer visiting the store and inspecting the scale.

CHAS. H. TIERNEY. [SEAL.]

Subscribed and sworn to before me at Pawtucket, R. I., this 16th day of December, 1921.

[SEAL.] BENJAMIN J. DYER,
Notary Public.

208 *Affidavit of James Shepard.*

James Shepard, being duly sworn, deposes and says as follows:

My name is James Shepard, age 74 years, residence 139 Lake street, New Britain, Connecticut; occupation, solicitor of patents and expert in causes appertaining to patents. I have been a solicitor of patents since 1866 and have frequently testified as an expert since 1873. Sometime in 1901 or 1902, I cannot give the precise date, I was employed by Landers, Frary & Clark as expert in a cause on computing scales brought, I believe, by the Computing Scale Company of Dayton, Ohio. In connection therewith I requested Mr. Samuel R. Munson, then their superintendent, to secure for use in that case a sample of the computing scale as made by one Phinney of Providence, R. I., under an old patent. This resulted in the production of two old computing scales, which were first brought to the factory of Landers, Frary & Clark and later sent to Messrs. Mitchell, Bartlett & Brownell, of New York, who were counsel for Landers, Frary & Clark. I have read the affidavit of George Walker in the above entitled cause and the two scales which he refers to therein are the scales which were procured in response to my request of Mr. Munson. They were made in substantial accordance with an old patent to one Phinney, the shell of the indicating drum being made of paper, which material, as I remember, is not mentioned in the said Phinney patent. I remember these scales distinctly and I believe that Mr. Walker's description of them in his affidavit is correct. I have recently visited the factory of Landers, Frary & Clark for the purpose of obtaining the old Phinney scales from them and was informed that they were destroyed, with the exception of the shaft brackets mentioned in Mr. Walker's affidavit.

JAMES SHEPARD.

Subscribed and sworn to before me, a Notary Public, this first day of January, 1913.

[SEAL.] HERMAN LUMPP,
Notary Pblic.

Affidavit of James Shepard.

STATE OF CONNECTICUT,
County of Hartford, ss:

James Shepard, being duly sworn, deposes and says as follows:

My name is James Shepard; age, 83 years; residence, 139 Lake street, New Britain, Connecticut; occupation, solicitor of patents and expert in causes appertaining to patents. I have been a solicitor of patents since 1866 and have frequently testified as an expert since 1873. Some time in 1901 or 1902, I cannot give the precise date, I was employed by Landers, Frary & Clark as expert in a cause on computing scales brought by The Computing Scale Company of Dayton, Ohio. In connection therewith I requested Mr. Samuel R. Munson, then their superintendent, to secure for use in that case a sample of the computing scale as made by one Phinney of Providence, R. I., under an old patent. This resulted in the production of two old computing scales, manufactured by said Phinney, which were first brought to the factory of Landers, Frary & Clark and later sent to Messrs. Mitchell, Bartlett & Brownell, of New York, who were counsel for Landers, Frary & Clark, who made reference in the answer filed in the cause to the gentlemen having knowledge of the manufacture and sale of the old Phinney scales. As far as I remember, no further action was taken in the case by either party, the case being allowed to become abandoned by a lack of prosecution. Mr. George Walker, who was for a long time scale expert for Landers, Frary & Clark was familiar with the Phinney scales which were found for use in this case. The scales were made in substantial accordance with a patent to Phinney, the shell of the indicating drum being made of paper, which material, as I remember is not mentioned in the Phinney patents. The end pieces of the indicating drums were of wood in spider form.

JAMES SHEPARD.

Subscribed and sworn to before me, a notary public, this thirty-first day of December, 1921.

[SEAL.] JENNY L. HAUGH,
Notary Public.

Affidavit of Bert W. King.

STATE OF MICHIGAN,
County of Wayne, ss:

Bert W. King, of lawful age, being duly sworn, deposes and says as follows:

I reside at Detroit, Michigan, and am in the employ of the Standard Computing Scale Company, Limited, of Detroit, manufacturers of computing scales. I have been in the employ of that company continuously since June 1, 1909, and prior to that date I was in the employ of The Computing Scale Company, of Dayton, Ohio, complainant in the above entitled cause. I have been connected with the manufacture of scales for the past eighteen years, and during my employment by The Computing Scale Company of Dayton, Ohio, I had charge of the final tests of the computing scales manufactured by said company, by which their adjustment and accuracy were determined. While I was in the employ of said last mentioned company, at Dayton, Ohio, it had in its possession a number of old computing scales, not manufactured by that company, which scales were provided with very light drums or cylinders composed of cylindrical paper shells and wooden end pieces mounted upon a shaft or spindle, the surfaces of the paper cylinders being provided with circumferential rows of figures to indicate the weights of the articles placed on the pan of the scale and the value of such articles at various prices per pound or ounce. On one occasion, about a year before leaving the employ of the The Computing Scale Company, I was directed to adjust one of said scales and put it in proper order for accurate weighing and price computation, and did so. The scale in question had a cast-iron body in which was
209 mounted a rotatable shaft or spindle to which was secured two light drums or cylinders such as those above described, the ends or heads of the drums or cylinders being composed of thin pieces of wood partially cut away to still further lighten them, and having cylindrical paper shells secured to and carried by them. A pinion was fastened upon the shaft or spindle between the two drums, and this pinion was engaged by a rack connected at its upper end with a coiled spring and having the scale

Affidavit of Bert W. King.

STATE OF MICHIGAN,
County of Wayne, ss:

Bert W. King, of lawful age, being duly sworn, deposes and says as follows:

I reside at Detroit, Michigan, and am in the employ of the Barnes Scale Company, of Detroit, manufacturers of computing scales. I have been in the employ of that company continuously since 1919, and before that was in the employ of the Standard Computing Scale Company, Limited, of Detroit, since June 1, 1909. Prior to that date I was in the employ of The Computing Scale Company of Dayton, Ohio. I have been connected with the manufacture of scales for the past twenty-seven years, and during my employment by The Computing Scale Company of Dayton, Ohio, I had charge of the final tests of the computing scales manufactured by said company, by which their adjustment and accuracy were determined. While I was in the employ of said last mentioned company, at Dayton, Ohio, it had in its possession a number of old computing scales, not manufactured by that company, which scales were provided with very light drums or cylinders composed of cylindrical paper shells and wooden end pieces mounted upon a shaft or spindle, the surfaces of the paper cylinders being provided with circumferential rows of figures to indicate the weights of the articles placed on the pan of the scale and the value of such articles at various prices per pound or ounce. On one occasion, about a year before leaving the employ of The Computing Scale Company, I was directed by the superintendent, Mr. Joseph Hopkinson, to adjust one of said scales and put it in proper order for accurate weighing and price computation, and did so. The scale in question had a cast-iron body in which was secured two light drums or cylinders such as those above described, the end or heads of the drums or cylinders being composed of thin pieces of wood partially cut away to still further lighten them, and having cylindrical paper shells secured to and carried by them. A pinion was fastened upon the shaft or spindle between the two drums, and this pinion was engaged by a rack connected at its upper end with a coiled spring and having the scale pan

pan suspended from its lower end. At the time I adjusted the particular scale which I have mentioned there were at least three other old scales, apparently identical with it, hanging up in the experimental room of the The Computing Scale Company at Dayton. All of these scales were substantially identical, in form and appearance, with the scale shown in Letters Patent No. 106,869 of August 30, 1870, to W. H. Phinney, and the one which I adjusted was substantially identical in construction with the scale disclosed in said Phinney patent, with the exception of its computing drums or cylinders, which latter were constructed in the manner above described. I had no occasion to examine the interior construction of any of the other scales of similar form and appearance which I have stated were in the experimental room of the Dayton company at the same time, but there was nothing in their form or appearance to indicate that they differed in any way from the particular scale which I adjusted.

I have examined the computing scale referred to in the affidavit of Thomas Z. Phinney in this case, and marked "Phinney Exhibit Sample Scale," and find that said scale is substantially identical in every respect with the old scales which I saw in the experimental room of The Computing Scale Company at Dayton, Ohio, and one of which I adjusted as above described. I have also examined the drum or cylinder referred to in the affidavit of said Phinney and marked "Phinney Exhibit Original Drum" and find that said drum or cylinder is identical with the drums or cylinders of the old scale which I took apart and adjusted at Dayton at the time above mentioned.

BERT W. KING.

Subscribed and sworn to before me this 7th day of May, 1913.

HUGO W. KREINBRING,
[SEAL.] *Notary Public,*
Wayne County, Michigan.

suspended from its lower end. After I had successfully adjusted the Phinney scale I was instructed to return the same to the experimental room, then in charge of W. H. Sanderson (now deceased). At the time I adjusted the particular scale which I have mentioned, there were at least three other old scales, apparently identical with it, hanging up in the experimental room of The Computing Scale Company at Dayton. All of these scales were substantially identical, in form and appearance, with the scale shown in Letters Patent No. 106,869, of August 30, 1870, to W. H. Phinney, and the one which I adjusted was substantially identical in construction with the scale disclosed in said Phinney patent, with the exception of its computing drums or cylinders, which latter were constructed in the manner above described. I had no occasion to examine the interior construction of any of the other scales of similar form and appearance which I have stated were in the experimental room of the Dayton Company at the same time, but there was nothing in their form or appearance to indicate that they differed in any way from the particular scale which I adjusted.

In 1913 I examined the computing scale referred to in an affidavit of Thomas Z. Phinney, and marked "Phinney Exhibit Sample Scale," and found that said scale was substantially identical in every respect with the old scales which I saw in the experimental room of The Computing Scale Company at Dayton, Ohio, and one of which I adjusted as above described. I also at that time examined the drum or cylinder referred to in the affidavit of said Phinney and marked "Phinney Exhibit Original Drum" and found that said drum or cylinder was identical with the drums or cylinders of the old scale which I took apart and adjusted at Dayton at the time above mentioned.

BERT W. KING.

Subscribed and sworn to before me this 7th day of January, 1922.

IGNATIUS F. WUJCZIYK,
[SEAL.] *Notary Public,*
Wayne County, Michigan.

My commission expires October 20, 1925.

Affidavit of William M. Raymond.

STATE OF RHODE ISLAND,
County of Providence, ss:

William M. Raymond, being duly sworn, deposes and says:

I am eighty-eight years old and reside at No. 43 Washington street, in the Village of South Attleboro, Town of Attleboro, County of Bristol and State of Massachusetts.

For a period of about twenty years dating approximately between the years 1872 and 1892 I was engaged in the butcher business in the City of Pawtucket, R. I., the first of the period running a butcher's cart and later running a market.

Over thirty years ago I purchased from William H. Phinney a new form of scale which I had heard that he was manufacturing. This scale was a self-reckoning scale, as it was provided with a drum carrying a list of figures which showed not only the weight, but the price of the article weighed.

The scale I purchased from Mr. Phinney consisted of a drum which revolved in a cast-iron casing. The drum was hollow and had two wooden ends which had holes through them, and there was a cylindrical tube of paper extending between these ends, and upon the outside of the paper were the figures which gave the weight and price. The scale was just like the one shown in the attached photograph.

219 I used the scale about five years, about four years of which I used it on my cart and the last year in a store which I opened at the corner of Japonica and Fountain streets in the Pleasant View section of Pawtucket, R. I., and all the time I used it the scale worked beautifully and accurately.

I paid Mr. Phinney $10 for the scale when I first purchased it from him, and I sold the scale, together with my business, to a Mr. Hiram W. Shaw.

I know that John H. Devlin used one of Mr. Phinney's scales like mine at the same time I was using mine.

WILLIAM M. RAYMOND.

Subscribed and sworn to before me at Providence, R. I., this 2nd day of January, 1913.

JAMES H. THURSTON,
[SEAL.] *Notary Public.*

Affidavit of George Walker.

George Walker, being duly sworn, deposes and says as follows:

My name is George Walker, age 53 years; residence, 119 Dwight street, New Britain, Connecticut; occupation, scale expert for Landers, Frary & Clark, of New Britain aforesaid. I have been in the employ of the said corporation since Sept., 1900. About a year or two after I entered their employ, two computing scales were brought to the factory for use in defense in a patent cause then pending, or threatened, which scales I was informed and believe were old scales which came from a son of an old scale maker of Providence, R. I. Each of these scales had a case the base of which was in the form of a round-topped box from the middle of which at the top was an upright extension which enclosed a counterbalancing spring. The lower part of the case had mounted therein a horizontal shaft carrying a divided drum and a pinion between the two sections of the drum. The shaft was actuated by a rack, attached to a drawbar, properly connected with the counterbalancing spring and in engagement with the said pinion. The drums were made of paper shells and wooden end pieces or heads, the shells having a computing table printed thereon for indicating the amount and cost through suitable openings in the case. The case of one scale was made of wood and that for the other scale was of metal. The shaft for the pinion and indicating drum, in the scale having the wooden case, was mounted in a pair of metal brackets secured within the case. I herewith produce the said brackets which are marked "Exhibit Old Scale Brackets," together with the name of this cause. Both of the said two scales were, soon after being procured, sent from the Landers, Frary & Clark factory, as I am informed and believe, to Messrs. Mitchell, Bartlett and Brownell, of New York City, where they remained for some time. They were finally returned to the factory and placed in my possession. They remained in my room until about July, 1912, when I moved into a new factory building. Before moving I was ordered by an officer of Landers, Frary & Clark to clear out all the old things from my room and put them into the scrap heap. I knocked the scale having the wooden case to pieces, but

saved the journal brackets hereinbefore produced and marked "Exhibit Old Case Brackets." All the other parts of the scale and the scale with the metal case were placed in the scrap heap and I have not seen them since.

GEORGE WALKER.

Subscribed and sworn to before me, a Notary Public, this first day of January, 1913.

[SEAL.] HERMAN LUMPP,
Notary Public.

211 *Petition of Toledo Computing Scale Company for Leave to Dismiss Appeal.*

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1934.

TOLEDO COMPUTING SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Petition.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Judicial Circuit:

Your petitioner, Toledo Computing Scale Company, appellant-defendant in this cause, respectfully prays that it may be allowed to withdraw or dismiss its appeal from so much and such parts of the decree appealed from as relate to and are based upon reissued Letters Patent No. 11,536, being one of the two separate letters patent upon which said decree was based, for the purpose of enabling your petitioner to present to the District Court a petition praying that said cause be reopened and your petitioner be permitted to introduce therein certain newly discovered evidence affecting the validity of said reissued letters patent, and without prejudice to the right of your petitioner to present and of the District Court to entertain and grant said petition if it be so advised, and without prejudice to the right of your petitioner to raise and have determined by this court all questions affecting the validity and infringement of said reissued letters patent upon any appeal which may hereafter be brought to this court from any final decree in this cause.

And in support of its petition your petitioner respectfully represents and shows:

That the appeal in this cause is an appeal from a decree of the District Court adjudging the validity and the infringement by your petitioner of two separate letters patent of the United States, to wit,

reissued Letters Patent No. 11,536 and original Letters Patent No. 597,300, both relating to computing scales, and granting an injunction against your petitioner and a reference to a master to take and state an account of the profits and damages recoverable by the complainant from your petitioner by reason of its infringement of said letters patent. That the claims of said reissued letters patent which are in suit, and upon which said decree was based, are claims 5 and 6, relating to the computing drum or cylinder of the scale illustrated and described in said letters patent, and reading as follows:

"5. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder.

"6. An indicator-drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton disks or frames of thin aluminum having a sheet of paper extending around and secured to their peripheries to form a cylinder.

That among the defenses to said reissued letters patent which were set up in your petitioner's answer in this cause and relied upon in its proofs was letters patent to the United States No. 106,869, granted to William H. Phinney of Pawtucket, Rhode Island, on
212 August 30, 1870, a copy of which patent will be found at page 828 of the appeal record in this cause. That said Phinney patent illustrates and describes an automatic computing scale substantially identical in its general construction and mode of operation with the automatic computing scale illustrated and described in the aforesaid reissued letters patent, and in particular illustrates and describes a computing drum or cylinder substantially the same in construction and mode of operation and function as the computing drum or cylinder illustrated and described in said reissued letters patent and covered by claims 5 and 6 thereof; but that the said Phinney patent does not disclose and its specification does not describe the particular materials of which the computing drum or cylinder of the scale illustrated in its drawings were constructed, nor the absolute or relative weight of said computing drum or cylinder; and that because of such fact the District Court found and held that said Phinney patent was not a substantial anticipation of claims 5 and 6 of said reissued letters patent, and sustained said claims and granted the complainant a decree thereon.

Your petitioner further shows that since the granting of said decree, and while your petitioner's appeal has been pending in this court, and since the last preceding term of this court, your petitioner has learned that the aforesaid William H. Phinney had manufactured and sold a number of computing scales constructed in accordance with this aforesaid patent between the years 1870 and 1880, and that such scales had been put into practical and commercial use by the purchasers of them, in Pawtucket, Rhode Island, and perhaps elsewhere, and had remained in use for considerable periods of time;

and that in the scales so manufactured and sold by the said Phinney, or some of them, the computing drums or cylinders consisted of "a spindle provided with a plurality of skeleton frames of light material secured to said spindle and having secured to their peripheries a sheet of paper forming a cylinder," as set forth in claim 5 of said reissued letters patent. That the computing drums or cylinders of such scales so manufactured and sold by the said Phinney were constructed and operated in substantial accordance with the drawings and specification of the said Phinney patent, but that the end pieces or heads of said drums were composed of very thin and light wood, similar to cigar box material, and further sawed out to form skeleton frames to still further lessen their weight, and that the cylindrical shells of said drums consisted of sheets of paper surrounding and affixed to said wooden end pieces or frames and having the computing figures arranged thereon. That these computing drums or cylinders of the old scales so manufactured and sold by the said Phinney therefore not only corresponded in construction and operation with the computing drum or cylinder described in said reissued letters patent and set forth in the claims thereof, but the shells or cylinders of said drums were formed of the same material as that specified in said reissued letters patent, while their end pieces or heads consisted of "skeleton frames of light material" secured to the axial spindle of the drum, as in said reissued letters patent.

Your petitioner further represents and shows, by reference to the file wrapper and contents of the application for said reissued letters patent, forming part of the appeal record in this cause and found at pages 636-649 (see particularly pages 646-648) that claims 5 and 6 of the application for said reissued letters patent were originally rejected by the Patent Office Examiner upon the aforesaid Phinney Patent No. 106,869, and that they were subsequently allowed upon the representation, and upon the belief by the Examiner, that it was entirely novel with the applicant for said reissued letters patent to form the cylindrical portion or shell of the computing drum of a computing scale of paper, which material now appears to
213 have been employed by Phinney for the shells or cylinders of the computing drums of scales manufactured and sold by him under his aforesaid patent more than forty years ago.

Your petitioner further represents and shows that it had no knowledge whatever of the manufacture and sale of the aforesaid scales by the said Phinney or any one else, until within the past three months, during which time it has caused the facts to be investigated and has ascertained them to be as above set forth; but your petitioner is informed and believes, and upon such information and belief asserts, that the complainant in this cause has had knowledge of the scales so manufactured and sold by the said Phinney, and so used by the purchasers of them, for more than ten years last past. That about the year 1901 the complainant, as your petitioner has recently discovered, brought a suit in the United States Circuit Court at Philadelphia against the Federal Scale Company for alleged infringement of the aforesaid reissued letters patent; that the defendant in that case discovered the fact that the above

described scales had been manufactured and sold by the said Phinney and put into use by the purchasers thereof, and that a considerable number of witnesses familiar with the facts were examined on behalf of the defendant in said cause, and one or more of the old scales having such paper and wooden computing drums were introduced in evidence in said cause, and that thereafter the prosecution of said cause was abandoned, and the depositions of said witnesses withdrawn or withheld from the files of the court, and the old Phinney scales which had been introduced in evidence were turned over to the counsel representing the complainant in that suit, and are believed to now be in the possession of said counsel or of the complainant itself.

Your petitioner further represents and shows that, after the abandonment by complainant of its aforesaid suit against the Federal Scale Company at Philadelphia, complainant, brought suit upon said reissued letters patent against your petitioner at its home office and place of business at Toledo, in the year 1907, but never prosecuted said suit and was forced to dismiss it four years later as a condition to being allowed to proceed with its suit against your petitioner upon the same patent in this jurisdiction, as more fully set forth in the sworn petition of your petitioner filed in the District Court in this cause, praying for a suspension of the injunction herein pending this appeal, which petition is found at pages 791-794 of the appeal record herein.

Wherefore your petitioner prays as it has hereinbefore prayed at the beginning of this petition, and for such other and further relief as the court may deem proper in the premises.

Very respectfully,

TOLEDO COMPUTING SCALE COMPANY,
Petitioner, Appellant-Defendant,
By HENRY THEOBALD,
President.

STATE OF OHIO,
County of Lucas, ss:

Before me, the undersigned, a Notary Public in and for the county and state aforesaid, this 14th day of January, 1913, personally appeared Henry Theobald who, being duly sworn, deposes and says that he is president of Toledo Computing Scale Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true, excepting as to the matters herein stated to be alleged on information and belief, and that as to those he believes it to be true.

[SEAL.]

D. H. KELLY,
Notary Public, Lucas County, Ohio.

214-1 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, 1921.

Nos. 2777 and 2784.

No. 2777.

THE COMPUTING SCALE COMPANY, Appellant,

vs.

TOLEDO COMPUTING SCALE COMPANY, Appellant,

No. 2784.

TOLEDO COMPUTING SCALE COMPANY, Appellee.

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Appeal and Cross Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Baker, Alschuler, and Evans, Circuit Judges.

In Toledo Computing Scale Co. v. Computing Scale Co., 208 Fed. 410, appellee's bill as based on claims 5 and 6 of reissue patent 11,536 and on patent 597,300, and the District Court sustained both patents and entered a decree of injunction and an order accounting for profits and damages. On appeal we held that patent 597,300 was void, and that reissue 11,536, was valid and infringed, but that there was imperfect proof of complainant's title to that patent. We accordingly reversed the decree and remanded the cause with directions to dismiss the bill as to patent 597,300 and "to permit complainant to introduce proof of title to reissue 11,536." On the remandment the District Court found that complainant had good title to reissue 11,536, and thereafter on May 4, 1914, reentered the original decree as to that patent, except that, the patent having expired in the meantime, the command to cease infringing was omitted.

Both parties are now appealing from a decree that confirms the master's report on the accounting and directs defendant to
214-2 pay complainant $404,101.97 with interest from the filing of the report; and defendant's first contention is that the present money decree of March 5, 1919, and the merits decree of May 4, 1914, should both be reversed with the direction to dismiss the bill for insufficient proofs of title.

In our findings of fact respecting the merits of reissue 11,536, we rejected the Phinney patent 106,869, issued in 1870, as an alleged anticipation. Subsequently defendant filed in this court a petition in the nature of a bill of review to open the decree in order to let de-

fendant prove that Phinney had done more for the art in commercial practice than he had disclosed in his patent. This petition we denied because defendant by the exercise of reasonable diligence could easily have brought the alleged new facts into the original hearing of the merits.

Defendant now insists that, on its proofs offered to the master and embodied in the record concerning Phinney's commercial practice, we should reverse our denial of the petition to re-open the case on the merits, should reverse our decree of 1913 and should reverse the District Court's decrees of 1914 and 1919 with the direction to dismiss the bill.

Alleged errors of the master against defendant are thus specified in the principal brief:

"His award to the plaintiff, as the profits derived by the defendant from the manufacture and sale of its infringing scales, constituting less than one-half of its entire business during the infringing period, of a sum approximating four times the amount of profits which it made on its entire business during said period.

"His failure to apportion, or to make any effort to apportion, the profits which he held to have been derived by defendant from the manufacture and sale of the infringing scales between the patented feature of the scale, constituting but a single element of it, and the remainder of the scale.

"His failure to give any consideration to the fact that except in respect to its employment of the light cylinder or drum defendant's scale was of a radically different type from the patented scale, and embodied numerous valuable and patented improvements, the property of the defendant, which it had acquired at great expense and which contributed largely to the utility and salability of its scales.

"His award to plaintiff of the entire profits which he
214–3 held to have been derived by defendant from its manufacture and sale of the infringing scales, including clearly and readily segregable profits derived from wholly independent attachments, such as the automatic electric lighting device.

"His award to plaintiff of the entire profits which he found to have been made by defendant not only upon its cylinder scales employing cylinders or drums having skeleton frames made "of light material," as required by the claims of the patent in suit, but its scales employing cylinders or drums having their skeleton frames made of steel, one of the heaviest of materials.

"His refusal to consider the several standards of comparison presented by the record, and to award to plaintiff merely the profits derived by defendant from the manufacture and sale of scales employing the cylinders or drums which it did employ as compared with the profits which it would have made by employing other cylinders or drums, open and free for its use, and capable of serving the same purpose."

Complainant's assignments of error go to the master's allowance of interest on defendant's investment; this disallowance of defend-

ant's profits on Canadian sales; his refusal to charge defendant with the full nominal selling price when secondhand scales were taken as part payment and his charging defendant with only the cash received for new scales plus the amounts realized from secondhand scales; his refusal to include in the accounting of profits the scales on hand but unsold at the end of the accounting period; and his refusal to allow anything against defendant for the good will of defendant's business as it stood at the end of the accounting period.

As a basis for considering these assignments and cross-assignments of error, we set out the master's very full and painstaking report:

Findings of Fact.

Description of the Parties and the Business of the Toledo Scale Company.

The plaintiff, Computing Scale Company, the owner of Reissued Letters Patent No. 11,536, the patent in suit, is a corporation engaged in the business of manufacturing and selling computing scales under said re-issued patent at Dayton, Ohio, and is sometimes referred to as the Dayton Company. 214–4

The defendant, Toledo Computing Scale Company, now the Toledo Scale Company, hereinafter called the Toledo Company, is a corporation engaged in the business of manufacturing and selling computing scales at Toledo, Ohio, and in the course of its business infringed Claims 5 and 6 of the patent in suit, as held by the Circuit Court of Appeals of this circuit in Toledo Computing Scale Company v. Computing Scale Company, reported in 208 Fed. 410.

The infringing or accounting period begins about the 1st day of October, 1906, when the defendant began making and selling the infringing scale, and ends on the 3rd day of September, 1912, when the patent expired.

When the Toledo Company began to manufacture and sell infringing scales, hereinafter called cylinder scales, it was conducting a large, well established business in manufacturing and selling computing pendulum fan scales. The fan scale shows weight and value by means of an indicator index-hand carrying prices per pound moving back and forth across a fan shaped dial, carrying on its face value and weight graduations. At this time defendant had its factory at Toledo and a built up organization for making and selling fan scales, and after it began to make and sell the infringing scale it continued in the same factory under the same organization to manufacture and sell both fan and cylinder scales.

The fan scale and cylinder scale business were carried on as a single business. The material used in manufacture of fan scales and cylinder scales was drawn from the same stock. The same men worked on both kinds of scales. The same salesmen sold both kinds of scales. The overhead expenses applied to both kinds of scales. The books of account and records of the company were not kept with a view to separate costs, expense or profits as between the two kinds of scales made and sold. Obviously the cost of making and

selling cylinder scales cannot be accurately determined, but by making use of percentages and apportionments costs and profits may be found with reasonable certainty.

Salesmen of the Toledo Company in making sales sometimes accepted second-hand scales from customers in part payment of the purchase price on sales of cylinder scales. Until in 1909 these allowances were carried in one account as "Exchange Scales."

214–5 From the beginning of 1909 there were two accounts, "Toledo Scale Allowances" and "Exchange Scales." Toledo Scale Allowances were scales of defendant's own make taken in part payment in exchange. Exchange Scales were scales of other makes taken in part payment in exchange. The plaintiff claims that in this accounting the defendant should be charged the full selling price of cylinder scales regardless of the fact that a portion of that price might have been paid by another scale taken in exchange. This claim has not been accepted.

The scales taken in as part payment were not all handled in the same manner. Some were destroyed entirely, others were fixed up, and sold as second-hand scales, and the account stated in this report includes second-hand scales, as well as new scales, and the profit or loss on second-hand scales has been treated the same as profit or loss on new cylinder scales.

In addition to allowances for exchange scales, special allowances, or deductions from the purchase price, were made for one reason or another. It might be on account of marring or to place a scale in some advantageous place or otherwise.

After a scale was sold and the sale entered on the books as a credit to the new sales account it might happen that the scale would never be delivered, or it might be repossessed by the Toledo Company for failure to pay an installment or for some other reason. For such transaction prior to 1909 there was one account on the defendant's books and it was in the form of debits to sales. During the year 1909 a new account was open called "Chargebacks" but the old method of debiting sales also continued in force to some extent. Both accounts are called chargebacks by the witnesses testifying on that subject. These chargebacks reduced the credits to sales to the extent of such chargebacks and the purchaser in such case forfeited whatever payment or installments he had made on the scale. The repossessed scale was refinished or rebuilt and sold over again as a new scale and was handled the same as if it had not been the subject of a previous sale.

Resident salesmen and traveling salesmen sold defendant's scales. In some large cities the defendant maintained branch offices with resident salesmen; outside of such large cities scales were sold by travelling salesmen.

Salesmen of the Toledo Company received a commission on sales made by them as compensation for their services. In making sales

214–6 agents were permitted to make an allowance of a stated amount on certain scales taken in part payment for new scales, for the salesman did not receive any commission on the amount so allowed for the exchange scale. Agents sometimes

llowed a greater amount for an exchange scale than was permitted y the company and sometimes made other allowances to the pur- haser. Such excess allowance the agent had to stand and the mount was charged against commissions in the Commission Ac- ount and was credited to the customer in his account.

The chargebacks, allowances and commissions above mentioned re an important element in the account to be stated and the man- ner of handling them has been a matter of controversy between the parties to this suit.

Before the taking of testimony began, on motion of the plaintiff, the Master entered an order directing the defendant to prepare and file with the Master an account in accordance with federal equity rule 63, specifying the information that such account should con- tain.

On January 15, 1915, the defendant filed an account prepared and certified to as correct by William A. Zolg, Auditor of the Toledo Company, hereinafter called defendant's account. Plaintiff objected to the account and moved for an order on defendant to make a fur- ther account in compliance with the Master's order. After some discussion it was agreed that Zolg should be produced before the Master for oral examination, and Zolg and other employees of de- fendant were afterwards produced and examined at Toledo where the books and records were, and the motion was not again called to the Master's attention.

Defendant's account covers only the period from March 8, 1911, to August 31, 1912, March 8, 1911, being the day on which the defendant began to manufacture scales with aluminum spiders. The spider in a cylinder scale is the frame-work inside of the cylinder. Zolg did not include in defendant's account business done prior to March 8, 1911, because he was directed by counsel for the defendant not to do so. Counsel for the defendant took the position that the defendant was not bound to account for scales not containing the aluminum spider although Zolg in defendant's account for the period covered therein included scales with steel spiders as well as scales with aluminum spiders.

The defendant's account, covering as it does but a fraction of the accounting period, does not furnish a basis for stating the account for the entire period, but the account furnishes useful in-
214–7 formation that has been used by other accountants who fol- lowed Zolg.

Marwick, Mitchell, Peat & Company, chartered accountants, of the City of Chicago, on plaintiff's behalf examined the books of account and records of the Toledo Company at Toledo and submitted, a report, introduced in evidence as Plaintiff's Exhibit 40. The report is elaborate and purports to show the profits made on cylinder scales during the accounting period. Mr. Hall, a member of the firm of Marwick-Mitchell, who directed the work, and others who examined the books and obtained the figures used in the report, testified as witnesses in the case.

After the plaintiff had closed its case in chief, Price, Waterhouse & Company, public accountants of the City of Chicago, on behalf of

defendant examined the books and records of the Toledo Company at Toledo and the report made by Marwick-Mitchell, together with the working papers used by Marwick, Mitchell in making their report. Price-Waterhouse prepared reports, introduced in evidence as Defendant's Exhibits 21, 22, 23, 26 and 27, and later along Defendant's Exhibit 61 was introduced. Price-Waterhouse did not prepare a report from the books showing the necessary information to construct a complete account of the business. They took the report of Marwick-Mitchell, Plaintiff's Exhibit 40, as a basis and made such additions to and deductions from the figures in that exhibit as they claimed the books and records of the defendant required. Defendant's accountants in Exhibits 21, 22, 23, 26 and 27 deal with the accounts for the year 1911 only, and, having obtained the figures for that year, use those figures as a basis of apportionment to arrive at the results of the business for the years 1906, 1907, 1908, 1909, 1910, 1911 and eight months of 1912, as shown by Defendant's Exhibit 61, covering the entire accounting period.

Price-Waterhouse attempted to reform the books of the Toledo Company as to the year 1911 and the calculations made by them and the results given are not based on the figures as they were entered on the books of the Toledo Company, but from figures that in their opinion should have been entered, that is, in many cases they disregarded the theory upon which the books were kept by the Toledo Company and substituted theories which they regarded as better. Defendant's Exhibits 21, 22, 23, 26 and 27 are based on such reformed accounts. Defendant's Exhibit 61 is made for the purpose of applying the results of the year 1911 as disclosed in De-
214–8 fendant's Exhibits 21, 22, 23, 26 and 27 to the business done in the other years of the accounting period. However, the figures shown in these exhibits were practically all abandoned on the hearing before the Master and the figures disclosed in Plaintiff's Exhibit 40, as changed and corrected on the hearing, were in the main acquiesced in by the Toledo Company and have formed the basis of the account as herein stated.

After defendant's exhibits were introduced Marwick-Mitchell prepared four additional reports, introduced in evidence as Plaintiff's Exhibits 77, 78, 79 and 80. Exhibits 77, 78 and 79 are statements comparing the figures obtained by Marwick-Mitchell for the plaintiff and Price-Waterhouse for defendant. Exhibit 80 is a statement of experimental, litigation and patent expenses that plaintiff claims should not be credited to the Toledo Company in this account.

The Toledo Company sold scales all over the United States, in Canada and other foreign countries. The scales sold in foreign countries other than Canada were manufactured at Toledo and sold from Toledo and shipments were made from Toledo to the purchasers. The defendant does not dispute the right of the plaintiff to the profits made on these scales and they have been treated in this report in all respects the same as domestic sales.

Gross and net sales of cylinders and fans and per cent each bears to total sales.

The gross sales of new cylinder and fan scales during the accounting period, exclusive of Canadian sales, are shown in the table that here follows, marked "A":

"TABLE A."

	Cylinder scales.	Fan scales.
1906	$5,760.00	520,925.00
1907	154,758.00	456,924.30
1908	459,372.50	444,345.81
1909	605,466.41	615,479.33
1910	789,358.11	523,625.78
1911	803,608.01	513,869.71
1912 (8 mo.)	516,216.61	353,144.09

From these gross sales there must be deducted what are termed chargebacks. When a scale was sold that did not stay sold or for some reason was never delivered or was repossessed after delivery by the Toledo Company, a credit was made in the proper
214-9 amount on the books, charging back the purchase price or the unpaid portion thereof. The following table "B" shows the net sales of new cylinder and fan scales, exclusive of Canadian sales, after deducting chargebacks. There is no dispute as to the figures used in Tables A and B.

"TABLE B."

	Cylinder scales.		Fan scales.	
1906	55 scales at	$5,444.00	5,360 scales at	$482,065.76
1907	1,159 " "	147,836.00	4,679 " "	420,842.84
1908	3,052 " "	437,076.75	4,581 " "	409,001.14
1909	3,929 " "	556,108.08	7,733 " "	583,572.67
1910	5,060 " "	722,625.76	6,615 " "	492,704.53
1911	4,675 " "	725,622.14	7,652 " "	475,770.27
1912 (8 mo.)	2,894 " "	469,031.71	4,768 " "	329,244.01

To arrive at conclusions as to credits and deductions hereafter to be made it is necessary to ascertain the per cent that the gross sales and also the net sales of new cylinder and fan scales bear to total sales. The following table "C" shows the gross per cent and the following table "D" shows the net per cents:

"TABLE C."

	Cylinder scales.	Fan scales.
1906	1.09% of total gross.	98.91% of total gross.
1907	25.30% " " "	74.70% " " "
1908	50.83% " " "	49.17% " " "
1909	49.58% " " "	50.42% " " "
1910	60.11% " " "	39.89% " " "
1911	60.99% " " "	39.01% " " "
1912 (8 mo.)	59.36% " " "	40.64% " " "

"TABLE D."

	Cylinder scales.	Fan scales.
1906	1.14% of total net.	98.86% of total net.
1907	26.00% " " "	74.00% " " "
1908	51.66% " " "	48.34% " " "
1909	48.80% " " "	51.20% " " "
1910	59.46% " " "	40.54% " " "
1911	60.40% " " "	39.60% " " "
1912 (8 mo.)	58.76% " " "	41.24% " " "

To obtain the gross business, excluding Canadian, the second-hand scale sales must be added. The following table "E" shows the gross cylinder sales, gross fan sales, gross second-hand sale and the total gross sale:

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"TABLE E."

	Cylinders.	Fans.	Second-hands.	Total.
1906	$5,760.00	$520,925.00	.....	$526,685.00
1907	154,758.00	456,924.30	$850.00	612,532.30
1908	459,372.50	444,345.81	21,647.10	925,365.41
1909	605,466.41	615,479.33	48,345.70	1,269,291.44
1910	789,358.11	523,625.78	92,107.79	1,405,091.68
1911	803,608.01	513,869.71	94,820.35	1,412,298.07
1912 (8 mo.)	516,216.61	353,144.09	95,170.80	964,531.50

Hereafter in the report the different cost figures will contain expenses of second-hand scales and therefore cylinder scales should receive credit for a part of the second-hand sales. The following table "F" shows the net sales of second-hand scales and the part thereof to be added to cylinder sales, apportioned on the percentage that net sales of new cylinder scales bear to total net sales of new scales:

"TABLE F."

1906	no second-hand sales.
1907	26.00% of $850.00 second-hand sales $221.00
1908	51.66% of 21,647.10 " " " 11,182.89
1909	48.80% of 48,345.70 " " " 23,592.70
1910	59.46% of 92,107.79 " " " 54,767.29
1911	60.40% of 94,820.35 " " " 57,271.49
1912 (8 mo.)	58.76% of 85,872.30 " " " 50,458.56

Manufacturing and selling expenses and other deductions. Manufacturing Cost.

The defendant kept no cost sheets or cost records during the accounting period and to arrive at costs reliance must be placed on the cost figures given in the defendant's account filed herein pursuant to an order of the Master directing the defendant to file an account in compliance with Federal Equity Rule 63.

The account was prepared by Mr. Zolg, Auditor of the Toledo Company, and covers the last ten months of 1911 and the first eight months of 1912. The information upon which Mr. Zolg bases his cost figures was obtained by him during the many years he was in

charge of the accounting department and from reports and information procured by him as to labor and material costs from the factory auditing department and from books, records and sources available to him. His connection with the Toledo Company renders it practically certain that the cost figures furnished by him are not unfair to that company and such cost figures have been accepted and relied upon by the plaintiff and have been adopted in this
214–11 report as the safest method of obtaining the manufacturing cost. The method used by Zolg in making the account as to overhead expenses has been approved and used by the accountants on both sides of the case. While the defendant's account covers only the period above mentioned, the cost of labor and material did not vary materially during the accounting period and it is therefore safe to apply Zolg's costs for 1911 and 1912 to the remainder of the period.

To obtain the cost of direct labor and material the net number of scales sold in each year has been multiplied by the cost figures given in defendant's account for the different styles of scales sold during the year. In cases where no cost was given for a particular style number of scale the cost figure used was the figure that the evidence showed applied to the scale nearest to it in cost for which a cost figure was furnished and which was substantially the same, Plaintiff's Exhibit 40. The net sales rather than the gross sales are used because repossessed scales were sold again as new scales and took a manufacturing cost when resold, and if the gross sales are taken, repossessed scales would receive a double manufacturing cost.

Having obtained in this way the cost of direct labor and material of cylinder scales, it is necessary to find the factory overhead of cylinder scales. The factory overhead that went into manufacturing cost is found in the following accounts on the defendant's books: Indirect Labor, Factory Supplies, Experimental Tools and Patterns, Packing and Shipping, Lumber, Trucking, Maintenance, Repairs and Alterations, Power, Heating and Light, Superintendent and Factory Office, Miscellaneous Factory Expense and Refinishing Expense. The total direct labor and material for fans and cylinders and the total factory overhead for fans and cylinders are given on the books of the Toledo Company and are not disputed.

Following the method used in defendant's account and by the accountants on both sides of the case, the total direct labor and material for fans and cylinders should be divided into total factory overhead for fans and cylinders and it will be found that the total factory overhead for each year is a certain per cent of total direct labor and material for each year, and on the theory that factory overhead for cylinder scales will bear the same ratio to direct labor and material for cylinders that total factory overhead for fans and cylinders bears to total direct labor and material for fans
214–12 and cylinders, the per cent figure so obtained should be used to find the factory overhead apportionable to cylinder scales.

The following table "G" shows the direct labor and material and factory overhead applicable to cylinder scales ascertained as above stated:

"TABLE G."

	Direct labor and material.	Factory overhead.	Total manufacturing cost.
1906	$817.30	$403.91	$1,221.21
1907	17,203.93	7,425.22	24,629.15
1908	45,187.17	18,612.60	63,799.77
1909	58,260.64	21,032.09	79,292.73
1910	76,457.55	48,130.03	124,587.58
1911	74,151.95	59,447.52	133,599.57
1912 (8 mo.)	46,157.98	33,556.85	79,714.83

In the manufacturing costs given above in each year there has been apportioned to and included in cylinder cost of manufacture a portion of the expenses shown in an account carried on the books of the Toledo Company called the Experimental Account. This is an account of the expenses of the Toledo Company's invention department. The evidence does not show the nature and character of the items of this account, nor does it show that any of the expenses in this account were incurred on account of cylinder scales or had anything to do with cylinder scales. One De Vilbiss, an inventor, was employed by the Toledo Company and was for several years at the head of this department. What De Vilbiss did and what others under him or connected with that department may have done or what the moneys charged as expenses were paid out for is not shown by the evidence. In fact it appears that nobody connected with the Toledo Company knows what the charges in this account represent.

Because of the absence of evidence as to the transactions and expenditures upon which the items of expense found in this account are based, the amounts yearly that have been already included in the manufacture cost of cylinder scales should be deducted.

The following table "H" shows the amount that has been included each year in manufacturing cost on account of the charges in this Experimental Account and it shows also the amount of manufacturing cost after deducting these accounts:

214–13 "TABLE H."

1906	$82.96	charged	which	deducted	leaves	cost	$1,138.25
1907	994.38	"	"	"	"	"	23,634.77
1908	2,896.40	"	"	"	"	"	60,903.28
1909	3,355.81	"	"	"	"	"	75,936.92
1910	4,801.54	"	"	"	"	"	119,786.04
1911	5,368.60	"	"	"	"	"	128,230.97
1912 (8 mo.)	4,081.90	"	"	"	"	"	75,632.93

Commissions.

The salesmen of the Toledo Company were compensated for their services with commissions on sales. The amounts paid out on account of commissions for the various years of the accounting

period are shown on the books of the company and are not in dispute.

There is a controversy between the parties as to the manner of arriving at the amount of commissions chargeable against cylinder scales. The plaintiff suggests that for the years 1906, 1907, 1908, 1909 and 1910 the commissions should be found by apportioning the total commissions shown on the books between cylinder and fan scales and that for the years 1911 and 1912, as defendant's account filed herein covering the last ten months of 1911 and the first eight months of 1912 shows the commissions paid to agents on cylinder scale sales and the number of cylinder scales sold during that time, the average commission on a scale should be found for the years 1911 and 1912 respectively and the average commissions so found should be applied to the number of cylinder scales sold in 1911 and 1912 respectively to ascertain the commissions for those two years.

Mr. Zolg who made the defendant's account reported the net commissions received by agents after the company had deducted therefrom excess allowances made by such agents to purchasers and did not report the amount of commission the agent was entitled to on such sales or that the company in fact paid. An agent sometimes made a greater allowance to a purchaser than he was authorized to make. In such cases the excess allowance was charged against his commissions in the commission account and he was paid the difference between the commission earned on the sale and the amount of the excess allowance.

The defendant suggests that its accountants allocated the commissions for 1911 to cylinder scales and that such allocation should stand for the year 1911 and be used as a basis of arriving
214–14 at commissions for the other years of the accounting period. The so-called allocation of 1911 was reached by reforming the commission account as shown on the books to conform to the theory of defendant's accountants and it was found impossible to allocate commissions to specific sales or to keep the business of 1911 separate and apart from the business of a portion of 1910 and a portion of 1912. The method used to ascertain commissions for the other years of the accounting period on the basis of 1911 might produce grossly inaccurate results, and the method used, the results of which are shown in the following table, is better suited to produce reasonably accurate results.

The plaintiff's suggestion as to the years 1906, 1907, 1908, 1909 and 1910 has been adopted and as to the years 1911 and 1912 has been rejected. The defendant's suggestion has been rejected.

The commissions attributable to cylinder scales have been determined by finding the per cent that total commissions bear to total net sales for each year and taking that per cent of cylinder net sales for each year. The net sales rather than gross sales have been used as the basis of calculation because commissions were allowed only on net sales. The following table shows the result:

"TABLE I."

	Per cent of commissions to total net sales.		Cylinder net sales.		Commissions chargeable to cylinder sales.
1906	31.73%	of	$5,544.00	gives	$1,759.11
1907	34.20%	"	148,057.00	"	50,635.49
1908	38.39%	"	448,259.64	"	172,086.82
1909	35.36%	"	579,700.78	"	204,982.20
1910	31.38%	"	777,393.05	"	243,945.94
1911	27.57%	"	782,893.93	"	215,843.86
1912 (8 mo.)	28.41%	"	519,490.27	"	147,587.19

Commercial and Selling Overhead.

The total commercial and selling overhead of the Toledo Company for the entire accounting period is not in dispute. It is made up of the following accounts: District Managers' Salaries and Expenses, Branch Office Expense, Miscellaneous Selling Expense, Cash and Quantity Discounts, Collection and Exchange Expense, Fidelity Bonds Expense, Freight on Scales, Insurance, Dining-Room Expense, Legal Expense, Litigation Expense, Patent Ex-
214–15 pense, Office Payroll, Office Supplies, Postage, Recording Orders, Rents, Taxes, Telephone and Telegraph, General Expense.

There is a dispute as to whether in apportioning these expenses between cylinder and fan sales the apportionment should be made on the basis of net sales or on the basis of gross sales. Inasmuch as commercial and selling overhead is necessary in making sales, whether those sales stand or whether they are rescinded, the division should be made on the basis of gross sales.

The following table "J" shows the total commercial and selling overhead for the respective years and the portion thereof chargeable to cylinder sales. (For the per cent figures used herein see Table C.)

"TABLE J."

			Total commercial and selling.		Applicable to cylinder scales.
1906	1.09%	of	$142,971.51	gives	$1,558.39
1907	25.30%	"	145,800.00	"	36,887.40
1908	50.83%	"	188,249.67	"	95,687.30
1909	49.58%	"	279,869.26	"	138,759.18
1910	60.11%	"	367,934.92	"	221,165.65
1911	60.99%	"	406,626.99	"	248,001.70
1912 (8 mo.)	59.36%	"	274,573.75	"	163,046.98

In the above commercial and selling overhead apportioned to cylinder scale sales are included the following amounts of litigation and patent expenses that should be deducted:

"TABLE K."

1906.....	1.09% of	$7,965.55,	$83.88	deducted	leaves	$1,474.51
1907.....	25.30% "	14,173.88,	3,585.99	"	"	33,301.41
1908.....	50.83% "	9,079.21,	4,614.06	"	"	91,073.24
1909.....	49.58% "	9,588.57,	4,754.01	"	"	134,005.17
1910.....	60.11% "	13,012.65,	7,821.90	"	"	213,343.75
1911.....	60.99% "	17,159.52,	10,465.59	"	"	237,536.11
1912 (8 mo.).....	59.36% "	22,525.68,	13,371.24	"	"	149,675.74

The expenses of the Legal Expense Account such, for example, as the expense of collecting accounts have been included in commercial and selling expenses. Litigation and Patent Expense are of a different character. The plaintiff introduced evidence as to these expenses in the years 1911 and 1912, showing that the items 214-16 were for expenses of this litigation, expenses of obtaining patents in this and foreign countries and other like charges. No evidence was introduced by either side explaining the items in these accounts for the other years of the accounting period, and it must therefore be assumed that they are of the same general character and not allowable as deductions in favor of the defendant. For vouchers and copies of these accounts for 1911 and 1912 see Vol. I of the transcript, pp. 378-382, 391-395, 400-410, 328-334, 215-274.

Losses on Agents' and Customers' Accounts.

The amount to be allowed the defendant on account of losses on agents' and customers' accounts was adjusted by agreement between counsel before the Master. By this agreement there is to be allowed to the defendant 3% on net sales of cylinder scales for each year of the accounting period except for the eight months of 1912. As to that period it was agreed that the amount shown in the defendant's account which was for new scales only should be taken and to this figure should be added 3% of second-hand cylinder sales, making the amount shown in the table. In addition to the above it was agreed that $5,166.46 should be distributed over the years in proportion to the losses in those years as shown by the following table:

"TABLE L."

1906.....	3% on cyl. sales,	$166.32	plus	$5.27 =	$171.59
1907.....	3% " " "	4,441.71	plus	233.99 =	4,675.70
1908.....	3% " " "	13,447.79	plus	708.28 =	14,156.07
1909.....	3% " " "	17,391.02	plus	916.45 =	18,307.47
1910.....	3% " " "	23,321.79	plus	1,228.96 =	24,550.75
1911.....	3% " " "	23,486.82	plus	1,147.17 =	24,633.99
1912 (8 mo.).....	(See above)	19,066.42	plus	926.34 =	19,992.76
		101,321.87	plus	5,166.46 =	106,488.33

Allowances.

The total allowances for second-hand scales taken in part payment for new scales for the different years of the accounting period are shown on the books of the Toledo Company, and the amounts shown are conceded to be correct. The books do not show how much of the allowances for any years was made on cylinder sales or how much was made on fan sales and some plan must be adopted to determine how much of the allowances is properly chargeable against cylinder sales.

The defendant claims that its accountants examined the books of the Toledo Company and allocated to cylinder sales the
214–17 allowances actually made on cylinder scale sales for the year 1911, and contends that the amount so allocated should be the amount charged against cylinder sales for 1911 and that the amount to be charged against cylinder sales for the other years of the accounting period should be found by taking the per cent of cylinder gross sales for each of the other years of the accounting period that cylinder allowances as shown by such allocation bear to cylinder gross sales for the year 1911.

It is not claimed that the accountants made an exact allocation of allowances to cylinder scales for the year 1911. It is conceded that the attempted allocation included a portion of the business of 1910 and a portion of the business of 1912, and the manner in which the books were kept, without any effort to distinguish between fans and cylinders, and the great number of transactions that had to be analyzed in the time the accountants gave to this work render it uncertain whether the claimed allocation would produce reasonably accurate results.

The method adopted as most suitable to produce reasonably accurate results for all of the years of the accounting period is to take that per cent of total allowances that cylinder net sales bear to total net sales. Net sales rather than gross sales are used because, when a sale was rescinded and the scale repossessed all allowances made on such rescinded sale were deducted from the allowance account.

The following table "M" shows the total allowances, the per cent of cylinder net sales to total net sales as given in Table D, and the allowances chargeable to cylinder sales:

"TABLE M."

	Total allowances.	Applicable to cylinders.		
1906	$18,554.45	1.14%	thereof	$211.52
1907	24,737.50	26.00%	"	6,431.75
1908	82,905.26	51.66%	"	42,828.86
1909	82,779.23	48.80%	"	40,396.26
1910	101,359.87	59.46%	"	60,268.58
1911	150,194.94	60.40%	"	90,717.74
1912	91,578.56	58.76%	"	53,811.56

Interest on Investment.

That the defendant is entitled in this accounting to credit for interest on its investment in the business is not disputed. The plaintiff and defendant, however, disagree radically as to the
214–18 proper basis for arriving at the amount for which defendant should have credit. The method suggested by the defendant has been adopted in this report; it is to take from the yearly statements, Plaintiff's Exhibits 8 to 15, the valuations of the tangible assets, excluding therefrom patents and good will, and on the investment thus ascertained for each year calculate interest at the rate of 5% per annum and apportion that interest so calculated to cylinder sales in the respective years on the ratio that cylinder gross sales bear to total gross sales as shown by Table C.

The following table "N" shows the total investment for each year, interest thereon at the rate of 5% per annum, and the amount of such interest apportionable to cylinder sales:

TABLE "N."

	Investment.	Interest at 5%.			Apportionable to cylinder sales.	
1906	$362.040	$18.102	of	which	1.09% =	$197.31
1907	423,220	21,161	"	"	25.30% =	5,353.73
1908	551,820	27,591	"	"	50.83% =	14,024.50
1909	634,600	31,730	"	"	49.58% =	15,731.73
1910	950,000	47,500	"	"	60.11% =	28,552.25
1911	1,000,000	50,000	"	"	60.99% =	30,495.00
1912 (8 mo.)	1,000,000	33,333	"	"	59.36% =	19,786.66

Canadian Business.

In addition to the business of the Toledo Company already considered, that company carried on a Canadian business from sometime in 1908 to the end of the accounting period. The scales were all assembled in Canada and all sold in Canada though some of the parts were made at the Toledo plant and some of the parts were procured in Canada. The evidence does not make it clear whether at any time during the period all of the parts were made at the Toledo plant, nor does the evidence make it clear that at any time during the period all of the parts were made in Canada.

The first sales of cylinder scales in Canada were made in 1908, presumably through the agency of Joseph P. Cleal, as it appears from the evidence that in 1909, a year later, Cleal maintained a branch office in Toronto where parts were assembled into completed scales. Sometime in 1910 an assembling plant was established at Windsor, Canada, and thereafter all scales sold in Canada were assembled at this plant. From the time Canadian sales began in 1908 to the time the Windsor plant was established in 1910 parts
214–19 of scales were manufactured at the Toledo plant and shipped to Canada where they were assembled. Whether during this time all of the parts necessary to make a com

pleted scale were sent from the Toledo plant or whether some of the parts were procured in Canada is not made clear by the evidence. After the assembling plant was established at Windsor in 1910 certain parts of the scales such as pinions, spiders, hubs, screws, etc., were shipped from Toledo to Windsor and other parts such as castings were procured and shipped direct from Hamilton, Ontario, to Windsor and there assembled.

The accounts relating to Canadian sales were carried on the books of the Toledo Company. Up to November 11, 1908, the Canadian sales were carried in the U. S. Sales Account, but on that day a Canadian Sales Account was opened. Beginning with the opening of the Windsor factory in 1910 the Canadian sales were kept in a separate section of the general journal of the company and a separate Canadian ledger was opened. Up until the beginning of 1912 there was no separate account kept of the items of expense of the Canadian business, but from the beginning of 1912 until the end of the accounting period the item- of discount, collection, freight and legal expense were separated. Canadian items enter into other accounts such as postage, recording orders, losses on customers' accounts, miscellaneous expense, supplies account, lumber, packing and shipping, etc.

The following table shows the total Canadian sales, both fans and cylinder, and separately the total cylinder sales:

"TABLE O."

1908.....	Total Sales,	$15,262.50,	Cylinder Sales.....			$10,610.00
1909.....	" "	77,667.41,	" "	.....		48,924.50
1910.....	" "	107,911.92,	" "	.....		73,358.35
1911.....	" "	149,644.23,	" "	.....		97,798.51
1912 (8 mo.).....	" "	108,960.00,	" "	.....		67,190.45

The books and records of the Toledo Company show the total Canadian profits. The following table shows such total profits for both fans and cylinders, the per cent of cylinder sales to total Canadian sales, and the profits on cylinder sales:

"TABLE P."

	Total profit.	Per cent of cyl. to total Canadian sales.	Cylinder profit.
1908	$6,317.67	69.52%	$4,392.04
1909	15,754.42	63.00%	9,925.28
1910	20,097.70	67.98%	13,662.41
1911	26,062.32	65.35%	17,031.73
1912 (8 mo.).....	18,047.31	61.67%	11,129.78
Total cylinder profit, Canadian.....			$56,141.24

214–20 The figures given in the above tables "O" and "P" are not in dispute. They are shown in Plaintiff's Exhibits 8, 9, 10, 11 and 12 and are the figures adopted by both sides.

The plaintiff claims that it is entitled to be credited with the profits shown above in this accounting, but as Canadian scales were

ssembled and sold in Canada and not in the United States and some arts of the scales were during a part or all of the time procured in Canada, profits on such sales have not been included.

Since profits have not been allowed on Canadian business, the defendant should be charged with all expenses on account of Canadian business that have entered into cost figures heretofore considered in relation to the United States business, and this the defendant concedes. As the manufacturing cost of United States sales was obtained by using a per scale cost for direct labor and material and taking the per cent of the figure thus obtained that total factory overhead bore to total net sales to find the factory overhead, it follows that the manufacturing cost of United States scales does not include anything on account of Canadian scales and nothing should be charged on account thereof. There should, however, be charged against the defendant on account of Canadian business a proportionate part of commercial and selling overhead expense of the Toledo Company after deducting therefrom items of expense that are applicable only to sales made in the United States such as district managers' salaries and expenses, special salesmen's salaries and expenses, branch office expenses, etc. In addition to these deductions there should also be deducted litigation expense since litigation expense has not in this report been included in the expenses of the United States business. (See table K where same was deducted.)

The following statement shows the amount of expenses each year in which Canadian business was done that should be charged against the defendant in this accounting, or, what is equivalent, added to the plaintiff's profits, as having already entered into commercial and selling overhead expense of United States scales:

214-21

Year 1908.	
Cylinder sales (net)	$437,076.75
Fan " "	409,001.14
Canadian " "	15,262.50
Total	$861,340.39

Of this total amount Canadian sales are 1.77%.

Total commercial and selling overhead is		$188,249.67
From which there should be deducted:		
Branch Office Expenses	$43,911.03	
District Agents' "	8,089.85	
Litigation Expense	9,079.21	
		61,080.09
		$127,169.58

of which 1.77%, represented by the Canadian business, is $2,250.59. In 1908 there was charged to cylinder sales 5.83% of the total commercial and selling overhead; 50.83% of Canadian commercial and

selling overhead, $2,250.90, is $1,144.13 which should be added cylinder profits.

Year 1909.

Cylinder Sales (net)	$556,108.
Fan " "	583,572.
Canadian " "	77,767.
Total	$1,217,448.

Of this total amount Canadian sales are 6.22%.

Total commercial and selling overhead is	$279,869.

from which there should be deducted:

District Managers' Salaries	$5,680.00	
" " Expenses	8,302.74	
Special Salesmens' Salaries	2,755.00	
" " Expenses	1,610.27	
Branch Office Expenses	57,902.22	
Litigation Expenses	9,588.57	
		85,838.
		$194,030.

of which 6.22% is $12,068.69, Canadian commercial and selli overhead. In 1909 there was charged to cylinder sales 49.58% the total commercial and selling overhead; 49.58% 214–22 Canadian commercial and selling overhead, $12,068.69, $5,983.65, which should be added to cylinder profits.

Year 1910.

Cylinder Sales (net)	$722,625.
Fan " "	492,704.
Canadian " "	107,911.
Total	$1,323,242.

Of this total amount Canadian sales are 8.15%.

Total commercial and selling overhead is	$367,934.

from which there should be deducted:

District Managers' Salaries'	$39,323.37	
" " Expenses	12,287.88	
Special Salesmen's Salaries	7,552.16	
" " Expenses	3,426.89	
Branch Office Expenses	83,157.90	
District Managers' Convention	145.25	
Litigation Expense	13,012.65	
		158,906.
		$209,028.

of which 8.15% is $17,035.85, Canadian commercial and selling overhead. In 1910 there was charged to cylinder scales 60.11% of the total commercial and selling overhead; 60.11% of Canadian commercial and selling overhead, $17,035.85, is $10,240.24 which should be added to cylinder profits.

214-23 Year 1911.

Cylinder sales (net)	$725,671.39
Fan " "	475,770.27
Canadian " "	149,644.23
Total	$1,351,085.89

Of this total amount Canadian sales are 11.70%.

Total commercial and selling overhead is $406,626.99

from which there should be deducted:

District Managers' Salaries	$42,400.37	
" " Expenses	11,577.91	
" " Convention	252.25	
Special Salesmen's Salaries and Expenses	66.29	
Branch Office Expenses	115,173.59	
Freight Outbound	12,991.19	
Freight Inbound	2,844.67	
Litigation Expense	17,159.52	
		202,465.79
		$204,161.20

of which 11.70% is $23,886.86, Canadian commercial and selling overhead. In 1911 there was charged to cylinder sales 60.99% of the total commercial and selling overhead; 60.99% of Canadian commercial and selling overhead, $23,886.86, is $14,568.59 which should be added to cylinder profits.

Year 1912 (8 mo.).

Cylinder sales (net)	$469,031.71
Fan " "	329,244.01
Canadian " "	108,960.00
Total	$907,235.72

Of this total amount Canadian sales are 12.01%.

Total commercial and selling overhead is $274,573.75

from which should be deducted:

214–24	District Managers' Salaries	$24,247.70	
	" " Expenses	6,142.10	
	Branch Office Expenses	66,654.29	
	District Managers' Convention	1,381.95	
	Freight Outbound	8,365.44	
	Freight Inbound	2,800.82	
	Cash Discounts	10,242.80	
	Collection and Exchange	3,476.41	
	Legal Expenses	7,840.30	
	Quantity Discount	883.50	
	Litigation Expense	22,525.68	
			154,560.99
			$120,012.76

of which 12.01% is $14,413.53 Canadian commercial and selling overhead. In 1912 there was charged to cylinder sales 59.36% of the total commercial and selling overhead; 59.36% of Canadian commercial and selling overhead, $14,413.53, is $8,555.87 which should be added to cylinder profits.

The following table "Q" shows the proportion of commercial and selling overhead expenses to be added to cylinder profit on account of Canadian business:

"TABLE "Q."

1908	$1,144.13
1909	5,983.65
1910	10,240.24
1911	14,568.59
1912 (8 mo.)	8,555.87
Total	$40,492.48

Statement of Whole Account.

The following statement is based on figures in the tables already given, "A" to "Q" inclusive, and shows the profits on cylinder scales for each year of the accounting period:

214-25

1906.

Cylinder Gross Sales		$5,760.00
Deduct Charge Backs		216.00
Cylinder Net Sales		$5,544.00
Deduct Manufacturing Cost	$1,138.25	
" Commissions	1,759.11	
" Commercial & Selling	1,474.51	
" Losses	171.59	
" Allowances	211.52	
" Interest	197.31	
		4,952.29
		$591.71

1907.

Cylinder Gross Sales		$154,758.00
Deduct Charge Backs		6,922.00
Cylinder Net Sales		$147,836.00
Add second-hand sales proportion		221.00
		$148,057.00
Deduct Manufacturing Cost	$23,634.77	
" Commissions	50,635.49	
" Commercial & Selling	33,301.41	
" Losses	4,675.70	
" Allowances	6,431.75	
" Interest	5,353.73	
		$124,032.85
		$24,024.15

1908.

Cylinder Gross Sales		$459,372.50
Deduct Charge Backs		22,295.75
Net Cylinder Sales		$437,076.75
Add second-hand sales proportion		11,182.89
Add Canadian Commercial Overhead proportion		1,144.13
		$449,403.77
Deduct Manufacturing Cost	$60,903.28	
" Commissions	172,086.82	
" Commercial & Selling	91,073.24	
" Losses	14,156.07	
" Allowances	42,828.26	
" Interest	14,024.50	
		$395,072.17
		$54,331.60

214–26

1909.

Cylinder Gross Sales		$605,466.41
Deduct Charge Backs		49,358.33
Net Cylinders Ssales		556,108.08
Add second-hand sales proportion		23,592.70
Add Canadian Commercial Overhead proportion		5,983.65
		$585,684.43
Deduct Manufacturing Cost	$75,936.92	
" Commissions	204,982.20	
" Commercial & Selling	134,005.17	
" Losses	18,207.47	
" Allowances	40,396.26	
" Interest	15,731.73	
		$489,259.75
		$96,424.68

1910.

Cylinder Gross Sales	$789,358.11
Deduct Charge Backs	66,732.35
Net Cylinder Sales	$722,625.76
Add second-hand sales proportion	54,767.29
Add Canadian Commercial Overhead proportion	10,240.24
	$787,633.29

Deduct	Manufacturing Cost	$119,786.04	
"	Commissions	243,295.94	
"	Commercial & Selling	213,343.75	
"	Losses	24,550.75	
"	Allowances	60,268.58	
"	Interest	28,552.25	
			$690,447.31
			$97,185.98

214-27 1911.

Cylinder Gross Sales		$803,608.01
Deduct Charge Backs		77,985.87
Net Cylinder Sales		$725,622.14
Add second-hand sales proportion		57,271.49
Add Canadian Commercial Overhead proportion		14,568.59
		$797,462.22
Deduct Manufacturing Cost	$128,230.97	
" Commissions	215,843.86	
" Commercial & Selling	237,536.11	
" Losses	24,633.99	
" Allowances	90,717.74	
" Interest	30,495.00	
		$727,457.67
		$70,004.55

1912 (8 Mo.).

Cylinder Gross Sales		$516,216.61
Deduct Charge Backs		47,184.90
Net Cylinder Sales		$469,031.71
Add second-hand sales proportion		50,458.56
Add Canadian Commercial Overhead proportion		8,555.87
		$528,046.14
Deduct Manufacturing Cost	$75,652.93	
" Commissions	147,587.19	
" Commercial & Selling	149,675.74	
" Losses	19,992.76	
" Allowances	53,811.56	
" Interest	19,786.66	
		$466,506.84
		$61,539.30

Profit for 1906	$591.71
" " 1907	24,024.15
" " 1908	54,331.60
" " 1909	96,424.68
" " 1910	97,185.98
" " 1911	70,004.55
" " 1912	61,539.30
Total profits	$404,101.97

214-28 Scales on Hand.

When the patent expired on the 3rd day of September, 1912, the Toledo Company had on hand manufactured and ready for sale 1839 cylinder scales. These scales were manufactured during the infringing period and ready for sale after the close of the infringing period.

It is claimed that while these scales had not been sold when the patent expired, there was a profit in them that the plaintiff is entitled to recover in this suit.

The profit made on 20,824 cylinder scales sold during the entire accounting period was $404,101.97 or $19.40 per scale. The profit made on the 2,894 cylinder scales sold during the eight months of 1912 immediately preceding the expiration of the patent was $61,539.30 or $21.26 per scale. The plaintiff claims that it is entitled to recover as profits for scales on hand at the close of the accounting period $19.40 per scale, being the average profit for the entire accounting period, amounting to $35,676.60.

Inasmuch as the profit in scales on hand was not in fact realized during the accounting period and can only be inferred and the evidence does not show that profit was realized afterwards by the defendant, such profit has not been included in this accounting.

Good Will.

The plaintiff claims that it should be allowed as profits in this accounting the value of the business gained by the defendant through its infringement, basing its claim on the fact that at the end of the accounting period the defendant had acquired by its infringement a going business in indicator drum scales of about $800,000 a year upon which a large profit was made.

While there can be no doubt that the business in cylinder scales built up by the defendant during the infringing period was a gain, value or advantage to the defendant at and after the close of that period, I find no evidence upon which to base a finding of money value that should be allowed on account thereof. Any allowance would necessarily be based on speculation. I have therefore not included anything on account of good will in this accounting.

214–29 Divisions of Profits.

The plaintiff proved that substantial profits were realized by the defendant in making and selling the infringing scale. This the defendant does not deny, but it contends that not all of the profits made are due to the patent because there were embodied in its cylinder scale non-infringing elements and improvements, patented and unpatented, such as the counterforce system, base and lever system, dash-pot, shock absorber, leveling device, etc. that contributed to the profit fund.

The eight patents under which defendant claims its cylinder scales were built were introduced in evidence as follows: Reissue No. 12,138, Defendant's Exhibit 63; No. 667,652, Defendant's Exhibit 38; No. 830,976, Defendant's Exhibit 39; No. 839,736, Defendant's Exhibit 37; No. 1,068,616, Defendant's Exhibit 47; No. 1,122,222, Defendant's Exhibit 60; No. 1,142,165, Defendant's Exhibit 62; and No. 1,163,128, Defendant's Exhibit 59. These patents are combination patents and do not cover the elements separate from the combination.

The elements that defendant contends contributed to the profits were old and open to the public and none of them, if separated from the structure of which it is a part, would in itself be a usable or workable tool.

Two infringing scales were introduced in evidence, one marked Complainant's Exhibit Defendant's Scale and the other Defendant's Exhibit 55, disclosing the structural parts of the completed scale.

The defendant called three witnesses experienced in the scale art: Halvor O. Hem, Consulting Engineer for the Toledo Scale Company; Charles G. Neale, Commissioner of Weights and Measures for the State of Minnesota; and Dr. Fritz Reichmann, formerly State Superintendent of Weights and Measures for the State of New York, now at the head of the Service Department of the Fairbanks Company of New York. Hem and Neal explained the various parts of an automatic computing scale and pointed out those parts on the scale exhibits mentioned above. Neither testified as to the value, mechanically, commercially or otherwise, of the separate parts. Dr. Reichmann went more into detail, explained the parts of an automatic computing scale, giving the relative importance from a mechanical and also from an economic standpoint of the different parts in per cent figures as follows:

From a mechanical standpoint: (1) Counterforce system 50%;
(2) Base and lever system 25%; (3) Connection between
214–30 counterforce system and indicating mechanism 2%; (4)
Dash-pot 5%; (5) Shock Absorber 2%; (6) Mounting for indicating device 5%; (7) Leveling device 5%; (8) Particular form of indicating device 2%; (9) Method of arranging figures on indicating device 2%; (10) Arrangement of openings to facilitate readings of such figures by dealer and customer 2%; making up a total of 100%.

From an economic standpoint: (1) Signs appearing on scale 5%; (2) Housing of scale 10%; (3) Lever system and com-

bination of a platform and indicating scale, robust appearance and color, 20%; Leveling device 5%; Dash-pot and Shock Absorber 5%; Divisions on particular chart used, 2%; Openings with correct reference marks on customer's and dealer's side for reading figures, 2%; Particular form of indicating device, 2%; Counterforce system, 49%; making up a total of 100%.

Dr. Reichman explained the necessary parts of a complete automatic computing scale without regard to whether it was of the cylinder, cone, dial or disc variety. He dealt with physical parts of a scale and made no distinction between the different kinds of indicating devices or between different devices of the same general kind but of different construction such as light and heavy cylinders. He wholly disregarded the question as to whether any of the parts were covered by patents, combination or otherwise, and did not take the patent in suit into account at all in assigning a value, mechanical or economic, to the indicating device or cylinder to which the patent applies. This may account for his conclusion that the importance of that part of the scale covered by the patent is but two per cent of the whole. The calculations made by Dr. Reichmann as to the relative values of the different parts of a complete machine without considering the value of a patent on one of the essential parts is not helpful in an effort to determine whether all or only a portion of the profits on the sales of the completed scales is due to such patent.

The Toledo Company advertised the infringing scale extensively, principally by circulars distributed to the purchasing public. These circulars called attention pointedly to the features of the scale, that the company claims make it superior to all others, particularly that the defendant's scale contains no springs, but is of the pendulum variety. On this feature of its scale defendant predicates its slogan "No Springs—Honest Weight." The defendant did not in its advertising literature mention the light drum, the feature 214–31 of the Smith patent. What effect such advertising had on sales is not known. No evidence was offered on that question.

The evidence considered in this division of the report is the only evidence in the case bearing directly on the question of a division of profits. It is not sufficient, as I view it, especially when read in connection with the decision of the Circuit Court of Appeals relating to the character and scope of the patent and its far reaching effect in the computing scale art, to establish that any portion of the profits is due to causes other than the patent.

Findings of Law.

I find the law of the case to be that the plaintiff is entitled to a decree against the defendant for $404,101.97, the profits made by the defendant company on the manufacture and sale of the infringing scale.

Most of the questions involved in this case are disposed of as questions of fact, or are covered by elementary principles of law.

There were 1839 cylinder scales, manufactured during the infringing period, on hand at the close of the period. Plaintiff contends that in these scales a profit inhered that was afterwards realized, and that the plaintiff is entitled to recover in this accounting as profits an amount per scale equal to the average profit per scale realized on the sale of the same kind of scales during the infringing period. No evidence was introduced as to market conditions prevailing after the close of the infringing period. Conditions may have been such that no profit at all was made on scales sold after the patent expired. Recoverable profits in accounting cases are profits actually realized, potential or prospective profits cannot be recovered.

In the account as stated cylinder scales have been made to bear overhead expenses on a proportion basis. The Toledo Company had an established plant and business and was selling fan scales at the time it began to make and sell the infringing scale, and the plaintiff contends there should only be charged against cylinder scales such expense as the evidence may show was added on account of the cylinder scale business. The rule laid down in the Tremolo patent case, 23 Wallace 518, seems just and equitable as applied to the facts in this case and has been adopted.

The plaintiff contends that, in view of the facts and circumstances and especially that the defendant has been allowed five per
214–32 cent interest on its capital invested, the plaintiff should be allowed in this accounting the value of the good will built up on cylinder scales during the infringing period. The good will of a business built up by an infringer is a gain or advantage, but not a profit, and its value cannot be recovered as profits. This suit has proceeded on the theory of recovering profits; besides there is no evidence as to the value of the good will and none upon which a finding in money value could be based.

The defendant urges that the evidence brings this case within division *d*, paragraph 1, of Westinghouse v. Wagner, 228 U. S. 604, 614; that as it appears from the evidence a part only of the profits was due to the patent, the burden of proof rested on the plaintiff to show that the entire marketable value of the scale is attributable to the patented feature, or to give evidence tending to segregate profits between the patented and unpatented features, or to show that by reason of intermingling the profits cannot be apportioned; that the plaintiff has not sustained this burden and is not entitled to recover more than a nominal sum. This contention is disposed of so far as the master is concerned by the finding of fact to the effect that the evidence when read in connection with the decision of the Circuit Court of Appeals is not sufficient to establish that any portion of the profits made is due to causes other than the patent.

It is a cardinal rule of patent law that where a patent produces but a part of the profits the plaintiff may recover only such part of the profits as the patent produces and the defendant may have credit for the remainder, and this rule holds good in cases where the patented part is so connected with other essential parts of the machine that if removed and nothing substituted in its place what remains will not be a complete or workable machine as well as in cases where the

patented portion is separable and when separated leaves the remainder a complete workable machine. Westinghouse v. Wagner, 225 U. S. 604; Dowagiac v. Minnesota, 235 U. S. 641; Herman v. Youngstown Co., 216 Fed. 607; Dunn v. Standard Co., 204 Fed. 617; Robbins v. Illinois Watch Co., 81 Fed. 958.

The cases cited above are cases in which a separation of the patented from the other parts would not leave a complete machine. It is too well settled to cite authorities that if the patent part of a machine be removed and what remains is a complete workable machine, segregation of profits should be made.

214–33 In reaching conclusions as to segregation the decision of the Circuit Court of Appeals in this case (208 Fed. 410) is controlling and what is said there is binding on the master. Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 447.

It was urged by counsel for defendant that claims 5 and 6 of the Smith patent in suit were not combination claims and that Smith himself had designated his invention as an improvement, that cylinder scales had been made and used prior to Smith's patent and that what Smith did was simply to improve the cylinder by making it very light. It is a complete answer to this contention that it appears from the decision itself the Circuit Court of Appeals was not unmindful of what Smith said in his claims and other patent papers or of the fact that Smith was not the first to use cylinder drums in computing scales.

It is not contended that claims 5 and 6 are combination claims, that Smith obtained a patent on every element of every computing scale in which the patent invention might be used, but it is contended—and this contention is borne out by the decision—that Smith alone had the right to connect his patented part with any weighing mechanism and that Smith's patent covered the cylinder drum in connection with any weighing mechanism.

It does not follow that because a patent covers a mere improvement, profits must necessarily be segregated. Whether they shall or shall not depends upon the nature and character of the improvement itself, and it may be that an improvement will be of such a character as to produce a new result and be the cause of producing all of the profits. In this case Smith invented the first usable automatic computing scale, he brought about a new result and became entitled to all of the profits regardless of how he may have designated his invention in his patent papers. An inventor is entitled to the full benefit of what he actually invents whether he sees fit to call it an improvement or to call it something else. The courts have recognized that a mere improvement or attachment is one thing and that an improved machine that produces a new result is another thing.

This case comes within division *a* of paragraph 1 of the Westinghouse case.

BAKER, *Circuit Judge*, after making the foregoing statement of the case, delivered the opinion of the court:

From this and many other cases we get the impression that patent lawyers are quite generally possessed of the belief that a patent-

infringement bill in equity, to stop future trespasses and to
214–34 make the defendant pay for past trespasses, is sui generis.
As this is counter to the conception of equity jurisprudence which we entertain and which lies at the root of many of the reasons given in the present decision, we proceed first to state briefly that conception.

Property may be classified as real or personal or mixed, and as tangible or intangible. But the right in property of all classes is one and consists ultimately of this and only this, the right to exclude others. When a new element in the material world was discovered, radium for instance, the possessing owner became entitled to the same rights and remedies that belonged to owners of previously known property. When the government created a new right in land in homesteaders, no statutory command was needed to open the door of equity to receive the homesteader's bill to stop future trespasses and to make the defendant pay for past trespasses. It would have taken a statutory prohibition to warrant the court in keeping him out. When the government, fulfilling the intent of the founders, granted to inventors a new right of property in their inventions, no statutory command was needed to open the door of equity to receive the patentee's bill to stop future trespasses and to make the defendant pay for past trespasses. It would have taken a statutory prohibition to keep him out; and a statute, stating that he may ask for an injunction and an accounting of profits and damages, should be construed simply as an affirmation of the pre-existing principles of equity.

So all bills for injunction are to vindicate the one fundamental concept of property, the right to exclude others. When the chancellor has found that the complainant has title, that he is possessed of the right to exclude the defendant, that the defendant has committed repeated trespasses, and that the defendant unless enjoined will continue (the defendant's state of mind can be proven only by the circumstances of his past trespasses unless he has admitted his intent), the decree of permanent injunction is the only adequate remedy, it exhausts all the equities of the bill, and it is final in its essence. It would also be final in time were it not that usually there is a legal appendage to the bill. Complainant's demand that he be made whole on account of past trespasses, if it stood alone, would have to be followed at law. But equity, having properly taken jurisdiction, draws to itself all other controversies arising from the same transactions, even if legal in their nature, and will not send the
complainant to the law side to get his money judgment for
214–35 past trespasses. And in rendering the equitable decree on the merits the chancellor has heard all the evidence and found all the facts that are necessary for the money decree except the amount.

In making the defendant pay, an accounting of the defendant's profits is not peculiar to the patent-infringement suit. If the homesteader sues his neighbor to stop the cutting down and carrying away of trees, he is entitled, after obtaining his permanent injunction, to show that the defendant sold a tree for $100, that his expenses were

$25, and that his net profit was therefore $75. As against the trespasser, who is a trustee ex maleficio, $75 is the true value of the appropriated property, although the owner might not have been able to get more than $50 from any one else. If $50 is the true valuation, and if the defendant has realized only $25 net profit, then the defendant must turn over his profit and also pay an additional $25. And if what is left of the domain has been damaged by the removal of the trees, the complainant, on proper proofs, is entitled to additional compensation. All these are means for measuring the total damage. The problem is always the same, to state in terms of money the results of the trespasses.

While the principles in the injunctional branch of equity are uniform, the practice in the patent-infringement suit has been disparate. Under the old rules, the court in reaching the permanent injunction was helpless to control the proofs. Depositions were loaded with hearsay, with immeasurable masses of irrelevant matter, with controversies of counsel, with counsel's directions to witnesses not to answer, with experts' analyses of hundreds of prior patents when six would have been more than enough, with experts' interlarding of their opinions of facts with their opinions of the law of the case, etc., etc. We conjecture that in our clerk's vaults there are tons of paper which were pure waste. We leave it at conjecture because we have no computing scales on which to weigh the more important matters, the clients' exhaustion of patience and resources, the lawyers' mutual infliction of unnecessary labors, and the efforts of the courts to find the three grains of wheat in the bushel of chaff. But those evils are gone. Under the new rules, when the chancellor hears a patent suit as he does other injunction suits in open court, he can and does control the proofs, exclude hearsay and irrelevancies, restrain counsel, compel witnesses to answer proper questions, limit the number of prior patents, and bridle the experts. Records on appeals now show the gratifying difference.

214–36 But when it comes to rendering the money decree on a master's report, with attached evidence, counsel seem to be yet at large. Frequently they toy with the master pretty much as they did with the notaries before whom they took the depositions for use at the hearing of the merits of the bill. In the present case our finding on the merits of the patent and the fact of infringement was made in 1913, and the District Court's finding of complainant's title to the patent, the only question concerning the merits of the bill left open on remandment, was made in 1914; but the money decree was not entered till 1919, and the review here was not ready for presentation until the current year. Imagine a law court, with the single issue before it of damages for established or conceded trespasses, or the value of property wrongfully appropriated, or the value of property about to be lawfully appropriated (a condemnation case), permitting the parties to engage the attention of a jury for five years. We are not noting this case as being exceptionally Jarndyce; we are merely taking it as a text in speaking of a general situation.

In our judgment the Westinghouse case, 225 U. S. 604, should forever extinguish in the minds of infringers, caught and held by a

decree on the merits, the hope, long entertained and theretofore frequently availed of with success, of escaping all but nominal damages by commingling the appropriated property with other property, by hiding, or by drawing herrings across the trail. Equity will pursue an infringer of a patent as vigilantly as it will any other trespasser. And the first fruits of the Westinghouse decision should be this: If a manufacturer, knowing of a patent, decides to chance an unlicensed use, he should realize that he may be caught by a final decree on the merits and be ordered to respond accordingly; and, so realizing, he should be held to the duty of keeping separate and accurate records of all his infringing acts; and, on his failure to keep such records, the court in measuring the damages on account of his trespasses should resolve all doubts against him.

New equity rule 63, we have no doubt, was intended to end the evils in reaching the money decree as completely as other new rules have ended the evils in reaching the merits decree. But if evils persist which can not be remedied by the rigid enforcement of rule 63, then, pending possible supplements to that rule, we believe that the chancellor, either in open court or through explicit directions to the master, in order to simplify and expedite the hearing has power to employ methods not inconsistent with promulgated rules.

214–37 If a defendant, his struggles over the merits being at an end, states his profits from the records contemplated in the preceding paragraph, the complainant (omitting for the moment any question of apportioning the profits between patented and unpatented parts) should be compelled to accept the statement as the measure of the money decree, unless he is prepared forthwith to allege and prove either (1) that the account was falsely stated or (2) that the profits, if truly stated, are not an adequate measure of the complainant's damages. If the first ground is sustained, the chancellor, either directly or through the master, might well appoint and qualify a competent and disinterested accountant to cure the defendant's default, and the report of the accountant should stand unless promptly impeached for fraud or gross inaccuracy. If the complainant should take the second ground, he might well be required to prove the value of the appropriated property as other such issues are tried, by the opinion testimony of experts qualified to speak of the value of the invention. And neither "established royalty" nor "reasonable royalty," as evidence of the value of the invention, would be necessarily the limit of value, for an infringer should not be allowed the profit which a licensee justly expects.

If a defendant satisfactorily states his profits from the infringing device, but contends that only a part thereof is attributable to the invention, he might well be required to allege in his account, taken as a verified pleading, the grounds on which he claims apportionment of profits, and his proofs should be limited to the averments.

Against this general background we proceed to view the assignments of error.

I. Defendant's contention that all the decrees should be reversed and the bill dismissed on account of complainant's alleged failure to prove title to the patent, is overruled.

A. Proof and finding of title constituted the base of the merits decree of 19[illegible]. No appeal was ever taken, unless the merits decree was carried along by the present appeal from the money decree. In our judgment the merits decree was final in its essence. National Brake and Electric Company v. Christensen, 258 Fed 880; same case, 254 U. S. 425; same case (decided herewith), — Fed. —. But, assuming that defendant's position is correct, that the seven years old merits decree is now open to assault in this court because it was not the last step in the suit, we find:

214–38 B. In 1895 the franchise was granted. It expired in 1912. During defendant's infringement complainant was in open, notorious, adverse, exclusive and continuous possession of the franchise. Before 1912 and ever since complainant has been in like possession of the present cause of action. As the patent expired in 1912, no one now can interfere with defendant's manufacture of cylinder scales. As infringement ended in 1912, the statute of limitation protects defendant from being called on to pay damages to third parties. For its established trespasses we think defendant ought to pay some one; and no one is at hand but complainant.

C. We remanded the case in 1913 for proof of title because the execution of assignments from the Smith Company to the Boston Company and from the Boston Company to complainant had not been proven, and defective acknowledgments prevented certified copies of the Patent Office records from being taken in lieu. Proofs of the execution of the Boston Company's assignment seem abundant and regular. As to the Smith Company's assignment the proofs show that all the stock was then owned by Bell and Luce, and they executed the assignment in the name and on behalf of the Smith Company. Whether there was a duly elected and acting board of directors, and proper officers, and due authorization by the directors for the officers to execute the instrument, are immaterial questions so far as defendant is concerned. An assignment in the name and on behalf of a corporation by all of its stockholders would convey at least a full equitable title.

II. Respecting the insistence that, on the proofs offered to the master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1913 petition to re-open the case on the merits, should reverse our precedent decree upholding the validity of the patent, and should reverse the District Court's decrees of 1914 and 1919 with the direction to dismiss the bill, we say:

A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leads us to reject the demand.

B. If it be regarded as a petition in the nature of a bill of review, appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal

its former bill of review on the same grounds, inclines us to stay
ır hands.

4–39 III. Defendant says that the master's report of $400,000 profits from cylinder scales is an inescapable and self-evi-
nt blunder because defendant's profits on its entire business during
e infringing period from October, 1903, to September, 1912, were
ly one fourth of that amount.

A. There is no reliable basis in the record for finding that de-
ndant's entire net profits were only one fourth of the master's
ward. In fact, as will more fully appear hereinafter, defendant
ver performed its duty, which arose at the end of its struggles on
lidity and infringement, of accepting the merits decree and mak-
g a full, frank and accurate report of its infringement doings.
ıt,

B. Defendant's claim of error involves this fallacy: In a business
mprising several branches, it is invariably true that each branch
akes a profit; or, if it be deemed possible that a non-infringing
anch should suffer a loss, then the profits from the infringing
anch should first be applied to covering that loss.

IV. Under an order to file a full, frank and accurate account in
mpliance with equity rule 63, defendant, by its auditor Zolg,
mited itself to the period from March 8, 1911, to August 31, 1912.
his account was false in that it included only the cash part of
les in which secondhands were taken as part payment. But the
aster rejected the account principally because he would not accept
e contention, now repeated here, that defendant was free to use
linder scales in which the spiders of the cylinders were made of
eel. March 8, 1911, was the date on which defendant claimed
at it began to make aluminum spiders for cylinders.

A. Claim 5 covered a cylinder frame "of light material"; claim
"of aluminum." Both claims were alleged in the bill and found
the merits decree to be infringed. Aluminum frames infringed
aim 6. Infringement of claim 5, unless we were in error in not
ding that claim to be a mere duplicate of claim 6, could only
ise from the use of material other than aluminum. Whether such
aterial, as used, was sufficiently light to secure the benefits of the
vention, was a question to be threshed out and settled at the final
aring on the merits.

B. If the question is open, we go back eight years to the original
cord and find that defendant's contention is a play upon the dis-
rity of specific gravities. In view of Smith's disclosure in 1895,
was not difficult for defendant in 1906 to use steel so thin that
the cylinders were of such "lightness" as to fill perfectly
4–40 the function of the cylinder in the complete weighing
machine. In the hair-spring of a watch the specific grav-
y of steel is immaterial. At the hearing of the merits appeal the
hibit before us had a cylinder with a steel frame. If defendant

is right in its present insistence, then auditor Zolg did wrong in including, after March 8, 1911, steel-frame cylinders as indiscriminable equivalents of aluminum-frame cylinders.

V. Defendant's principal assault upon the master's finding of profits on cylinder scales is directed to his acceptance of Zolg's figures on manufacturing cost. Defendant, after taking more than five months to prepare, filed Zolg's verified statement of manufacturing cost of cylinder scales from March, 1911, to September, 1912. And the master found that "the cost of labor and material did not vary materially during the accounting period, and it is therefore safe to apply Zolg's costs for 1911 and 1912 to the remainder of the period."

A. Defendant never complied with equity rule 63. For this inequitable attitude, defendant might well be held in default and, as other defaulters, to have forfeited the right to be heard until the default was set aside and a meritorius answer submitted. And the fact that the master and complainant took it upon themselves to state the account did not legally cancel the default.

B. Complainant accepted and acted on Zolg's figures of labor and material costs, and thereupon employed Marwick-Mitchell, chartered accountants, to examine defendant's books and records, and therefrom to report all the other elements necessary to a just accounting, such as manufacturing overhead, office overhead, selling expense, number of scales sold, gross and net sales, etc. After complainant's accountants had filed Exhibit 40, defendant employed Price-Waterhouse, chartered accountants. They did not examine the books and records for the accounting period, as they might have done. They confined their examination to 1911 and reported a theory by which auditor Zolg's figures on labor and material from March, 1911, to September, 1912, would be erroneous. They did not cover even the whole of Zolg's period. In preparing to discredit Zolg they "attempted to reform the books of the Toledo Company as to the year 1911, and the calculations made by them and the results given are not based on the figures as they were entered on the books of the Toledo Company, but from figures that in their opinion should have been entered." Having thus shown
214–41 that Zolg's figures of labor and material cost were wrong, they were ready to prove that Marwick-Mitchell were necessarily wrong. Defendant's default was not cured by such procedure. On the other hand, Marwick-Mitchell's account was a complete supplement to Zolg's account, and the two together covered the whole situation.

C. The master looked into the eyes and heard the voices of Zolg, Marwick-Mitchell and Price-Waterhouse. Intelligence and credibility of witnesses were involved.

D. Evidently from what occurred before him at the hearing the master found that the Price-Waterhouse calculations "were practically all abandoned on the hearing before the master, and the fig-

ures disclosed in Exhibit 40, as changed and corrected on the hearing, were in the main acquiesced in by the Toledo Company." Employment of new or additional counsel can not reinstate a matter that has been waived in open court.

VI. On the master's finding and on the state of the evidence, rejection of defendant's claimed allowances for expenses of litigation and of maintaining an experimental department and taking out patents, was right. The master was not compelled to substitute guesswork for defendant's failure of proof.

VII. Confirming, as we do, the District Court's confirmation of the master's report of profits on cylinder scales, there remains the alleged error in awarding all the profits to complainant.

Claims 5 and 6 covered Smith's invention of an indicating cylinder for use in association with (and in that sense, in combination with) any weighing mechanism so that the whole should constitute an automatic computing scale. It is immaterial that the claims are not combination claims, as "combination" is used in patent-law vernacular. If they were, the question would be the same: Of what did Smith's invention consist and what did it contribute to the weighing art? In deciding the merits in 1913 we held that Smith's invention resulted in "the first usable automatic computing scale." In the Westinghouse case it was held:

"(*a*) Where the infringar has sold or used a patented article, the plaintiff is entitled to recover all the profits.

* * * * * * *

"(*d*) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only part of the profits. * * * In such case * * * he must show, by 214–42 equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

A. From our finding that Smith produced the first usable automatic computing scale, the master may be right in holding that this case comes within division (*a*) of the Westinghouse case, in spite of defendant's assertion of the absurdity of it, based on the illustration of allowing all the profit on a steam-engine to the inventor of the governor. If therefore the steam-engine had raced and racked itself to pieces so that commercially it was not a successful producer of power, then the inventor of the governor might be held to have created the first commercially successful steam-engine, though there were in existence at the time other commercially successful producers of power. And though prior to Smith's time there were many classes of commercially successful scales, Smith originated a new class, the first usable automatic computing scale.

B. But it is not necessary to let the case rest on division (*a*). From the master's elaborate account, showing equal cost of fan scales and cylinder scales, diminishing prices for fan scales, increasing prices for cylinder scales (indicating a stronger demand and readier sales), one can figure that the average difference in selling prices of the two types would account for all the profits on the cylinder scales, and thus demonstrate that the features common to the two types, such as electric lights to illuminate the readings of weight and price, created no part of the profits on the cylinder scales, but that all were due to the distinguishing element, the cylinder. So division (*d*) of the Westinghouse decision likewise supports this case.

C. Defendant seeks to use its hereinbefore mentioned evidence of Phinney's commercial practice as a standard of comparison for apportioning the profits on the cylinder scales between the cylinder and the other parts. In its own factory defendant furnished a most excellent standard of comparison, in fact the best we have ever found in accounting cases. Its fan automatic computing scale was a later production than complainant's. The two types were virtually duplicates except fan and cylinder. They were made by the same machinery, the same labor, from a common stock of materials, and handled by the same supervising and selling staffs. In
214–43 paragraph B of this section we have already made the comparison.

D. Defendant's failure to maintain any sort of cost accounting system, its commingling of the two businesses, its sales of fan scales and cylinder scales as integers without assigning any cost or any profit to any part of either, have made it impossible for us to reach any conclusion other than that adopted by the master as to the profits of defendant's business in cylinder scales and the award thereof to complainant.

In regard to complainant's assignments of error we find:

I. Interest on investment is really the value of the use of defendant's manufacturing plant and selling facilities in making and selling cylinder scales. This credit item was apportioned by the master according to the relative volumes of fan and cylinder business. We find no substantial basis for recasting the master's figures. That such an allowance is a just credit against gross profits, see Western Glass Co. v. Schmertz Wire Glass Co. 226 Fed. 730 (7th C. C. A.), and Oehring v. Fox Typewriter Co. 251 Fed. 587 (2nd C. C. A.).

II. Defendant made profits on sales of cylinder scales in Canada. But no completed cylinder scale nor completed cylinder was ever shipped to Canada. Some parts were manufactured in Canada, and some were made here and shipped there; but the parts were there assembled into completed scales and there delivered to Canadian users.

Because some of the parts were made in this country, complainant insists that defendant is to be held here as a contributory infringing maker. But contributory infringement can only arise in this country when somewhere and somehow in this country there is a completed infringement to which a contribution can be made. Bullock Electric Co. v. Westinghouse Co. 129 Fed. 105.

An additional urge is that defendant is liable as an infringing seller in this country because Canadian salesmen sent the orders of prospective Canadian users of the Canadian scales to defendant's office in Toledo for approval and such orders were not filled from the Canadian plant until so approved. Complainant is doubtlessly right in saying that the contract was executed (but not in the sense of performed) in this country. It seems to us that complainant is confusing a sale with an executory contract for a sale. If complainant's position is correct, then a Canadian manufacturer, who made his goods only in Canada and parted with them only to Canadian users, would infringe a United States patent if he should meet here a prospective Canadian user and should enter into an executory contract to be performed in Canada.

214–44

III. Respecting the master's disposition of secondhand scales, we reject complainant's proposition that "when defendant sold an infringing scale at a fixed price in money it must account for that price in money." If the "fixed price" was $150, and if defendant accepted in full payment $100 in money and a secondhand scale, then, although defendant in fact only realized $25 net from selling the secondhand, in an accounting of realized profits must defendant account for an additional $25 of profits that it did not realize?

IV. At the end of the accounting period defendant had on hand 1839 infringing scales. Undoubtedly this was an advantage to defendant and a damage to complainant as competitive makers and sellers of automatic computing scales. But the proofs before the master proceeded on the basis that all of complainant's damages would be satisfied by an award of defendant's profits from the infringement. Complainant did not prove, as it might well have done, the market conditions after the close of the infringing period or what defendant did with the 1839 scales. We agree with the master that he was not required, on the state of the proofs, to speculate concerning potential or prospective profits. Robinson on Patents, Section 1139 (Note 2).

V. At the end of the accounting period defendant possessed a going business in cylinder scales, and the making of cylinder scales was then free for all. But no manufacturer who had respected the patent would be in such an advantageous position. Complainant, as a manufacturer of its originally patented scale, would have a good start and could probably maintain an easy lead over the law-abiders. Defendant's advantages by means of its infringment, its organized plant, its trained mechanics and salesmen, its scales in process of manufacture, its stock of materials, and its accumulated impetus

from past advertising, are obvious. Equally obvious is the damage to complainant (as a manufacturer, not as a patentee who is entitled to exercise his right to exclude irrespective of his making the patented article) by having such a competitor unlawfully created. But, although infringement ended in 1912 and the matter of the money decree was not on until 1914, complainant came before the District Court and the master, not as a manufacturer that had been damaged as aforesaid, but solely as the owner of a franchise
214–45 to exclude others from practising the invention. And there was no evidence on which to make an assessment of such damages.

Assuming that complainant might be able on remandment to prove substantial damages under hearing IV or V or both, does equity require that this case, based on a patent issued in 1895, be now opened in order to permit complainant to better its hold? Though defendant has been in default since 1914, we conceive that, if the case is to be opened at all, it should be opened for both parties. And the final result might be the present result, by defendant's being able to make a true showing of profits which would be as much less than the master's present award as the amount of damages complainant might be able to prove for leftover scales and good will. On the whole we believe that the master has worked out substantial justice on the present record and that the time has now come for ending the litigation.

The decree is affirmed.

A true copy.

Teste:

——— ———,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

214–46 [Endorsed:] No. 307. District Court of United States, Northern District of Ohio, Western Division. Toledo Scale Company, Plaintiff, vs. The Computing Scale Company, Fidelity and Deposit Company of Maryland, et al., Defendants. Separate Answer of the Computing Scale Company. Filed Feb. 10, 1922. Edward M. Holloway, Clerk. Zane, Morse & Marshall, 709 Harris Trust Building, Chicago.

215 And afterwards, on the same day, to wit: on the tenth day of February, 1922, in the October term aforesaid, there was filed in the office of the clerk of this court a certain answer of the Toledo Scale Company to the order to show cause entered March 1, 1922, which said Answer is in the words and figures following, to wit:

216 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Answer of the Toledo Scale Company to the Order to Show Cause Entered February 10, 1922.

Tenny, Harding and Sherman, Brown, Geddes, Schmettau and Williams, Tracy, Chapman and Welles, Counsel for Toledo Scale Company.

Filed Feb. 10, 1922. Edward M. Holloway, Clerk.

217 In the United States Circuit Court of Appeals for the Seventh Circuit.

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221 In the United States Circuit Court of Appeals for the Seventh Circuit.

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TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Answer of the Toledo Scale Company to the Order to Show Cause Entered February 10, 1922.

Now comes the Toledo Scale Company and for answer to the order entered herein on February 10, 1922, requiring it to show cause why it should not be adjudged in contempt of this court by reason of the filing of its bill of complaint and the obtaining of the temporary restraining orders without notice and the application for a temporary injunction in the case of Toledo Scale Company, Plaintiff, vs. The Computing Scale Company, et al., Defendants, in the District Court of the United States for the Northern District of Ohio, Western Division, and why it should not be enjoined from taking any further proceedings in said cause or upon said temporary restraining orders or upon said application for a preliminary injunction respectfully shows to the court as follows:

(1) The respondent has had no intention of committing any act in contempt of this Court and is advised and represents that it has committed no such act.

(2) After this Court filed its opinion herein on Octo-

ber 4, 1921, and during the pendency in the Supreme Court of the United States of this respondent's petition for writ of certiorari, to-wit, on or about December 20, 1921, this respondent first obtained knowledge and evidence that the Computing Scale Company had perpetrated a fraud upon this respondent and upon the United States District Court for the Northern District of Illinois, Eastern Division, and upon this court in this: that said The Computing Scale Company, being the owner by assignment of said Smith Reissue Patent No. 11536, and having knowledge that a scale manufacturer named Phinney had, many years before said Smith applied for his original patent, manufactureed, sold and placed in commercial usuage scales embodying an indicating cylinder of light-weight skeleton formation covered only with paper, substantially identical with Smith's cylinder and knowing that such manufacture, sale and use of said Phinney scales constituted a complete anticipation of said Smith Reissue Patent and a full defense as against any claims for infringement of said Smith Reissue Patent, whether said Phinney had ever obtained a patent thereon or not, formed and carried out a plan to purchase or acquire or otherwise obtain possession and control of all of said Phinney scales and to destroy or secrete the same, so as to keep the knowledge and evidence of the manufacture, sale and commercial usage thereof from those whom The Computing Scale Company might sue for infringement of said Smith Reissue Patent, including this respondent, and thereby to impose upon the Courts and to deprive the parties defendant in any such suits for infringement, including this respondent, of all opportunity to assert a defense against said Smith Reissue Patent based upon the commercial practices of said Phinney as distinguished from the defense based upon the Phinney patent, which patent did not describe a light-weight cylinder of the character in fact manufactured by him, as said The Computing Scale Company well knew; and that in pursuance of said fraudulent plan, said The Computing Scale Company had in fact acquired or obtained control of and secreted or destroyed or otherwise suppressed all or substantially all of said Phinney scales, and had then filed said suit in said District Court against this respondent, falsely alleging the priority of the Smith Reissue Patent, and by said practices kept this respondent and said courts in ignorance of the existence of said evidence and deprived respondent of a complete and valid defense therein until too late to be

available as a matter of right in said cause.

(3) This respondent laid before its legal counsel such facts and evidence as were then in its possession with respect to said fraud of The Computing Scale Company and furnished its counsel with a copy of the printed record which had been filed in the United States Supreme Court with this respondent's petition for a writ of certiorari, and this respondent sought the advice of its said counsel as to what rights and remedies it would have against The Computing Scale Company by reason of its fraudulent conduct in the event said petition for a writ of certiorari should be denied. This respondent was thereafter informed by its counsel that they had considered the questions which were before the United States District Court for the Northern District of Illinois, Eastern Division, and before this Court, as shown by said printed record and had considered the affidavits and other information submitted to them by this respondent with respect to the fraudulent conduct of The Computing Scale Company and this respondent was advised by its counsel that in their opinion this respondent had a meritorious cause of action in equity and was entitled to a day in court upon the question as to whether said The Computing Scale Company had been guilty of such fraud in obtaining the said judgment and in preventing this respondent from making its defense in said suit as that it would be in equitable and unjust for said The Computing Scale Company to enforce said judgment and decree against this respondent. Said counsel further advised this respondent that an application for relief against a party who had obtained judgment by fraudulent conduct in preventing the defeated party from obtaining and presenting the evidence necessary to establish its defense by acquiring or otherwise obtaining control of and suppressing such evidence must be brought by an independent bill filed in a District Court of the United States, or a state court, and that relief against the successful party for such fraudulent conduct could not be had by a bill of review or any other form of application filed in a United States Circuit Court of Appeals, and said counsel further advised this respondent that such an independent bill for relief against such fraud and imposition upon the court and the defeated party could be properly filed without first applying for and obtaining leave of any court. And respondent was further advised, and now asserts, that its motion made on or about January 21st, 1913, to dismiss its appeal as to one of the

patents involved in said suit, and its motion made on or about May 14th, 1913 that this court should include in its mandate to the District Court permission to entertain an application to recieve further evidence on behalf of respondent, as shown in said motions; and the arguments made upon these matters in the briefs filed on respondent's behalf upon the second appeal herein, and in the Supreme Court of the United States, upon the application for certiorari; did not involve the right or cause of action for relief against the fraud alleged in the bill which this respondent afterwards filed in the District Court for the Western Division of the Northern District of Ohio; but involved applications to the discretionary power of this court in connection with its appellate jurisdiction to review the decree and proceedings of the District Court for the Northern District of Illinois; that these applications and arguments were based upon a claim of newly discovered evidence, and not upon extrinsic fraud as an original cause of action, and did not present or involve the facts showing such fraud which were afterwards discovered; and that the rulings and decisions of this court upon said applications, and the statements with reference thereto in its opinions did not constitute a bar, by way of adjudication or otherwise, to the prosecution of an original bill for relief against such fraud.

(4) Respondent's counsel further advised respondent that it might properly file an independent bill of the character referred to in the preceding paragraph hereof either in the United States District Court for the Northern District of Illinois, Eastern Division, or in any other United States District Court or any state court having jurisdiction of the parties, and said counsel further advised respondent that in their opinion such independent bill might properly be filed in the United States District Court for the Northern District of Ohio, Western Division and that same should be filed therein by reason of the fact that for the full protection of this respondent it was necessary that an injunction be obtained against certain banks which were residents of the Northern District of Ohio, Western Division, except one which was a resident of the Northern District of Ohio, Eastern Division, and that The Computing Scale Company is an Ohio corporation having its principal place of business in the Southern District of Ohio, to-wit, at the City of Dayton, Ohio, and that such injunction against said banks could not be obtained in the United

States District Court for the Northern District of Illinois, Eastern Division, for the reason that said banks were not parties to the original litigation in said courts, and that they would not be subject to the process of that court in any such proceeding and for the further reason that said suit could be prosecuted at less expense and a determination thereof more speedily reached at Toledo, that bing respondent's principal place of business and its witnesses being more readily available there.

(5) On the 9th day of January, 1922, the Supreme Court of the United States denied respondent's petition for a writ of certiorari hereinbefore mentioned, and thereupon on said day in pursuance of and relying upon the advice of its counsel aforesaid this respondent filed its bill of complaint and a motion for a temporary restraining order and a preliminary injunction in the United States District Court for the Northern District of Ohio making parties defendant therein The Computing Scale Company, the banks hereinbefore mentioned and Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, which were sureties upon the bonds given by it to stay execution of said judgments rendered by said United States District Court for the Northern District of Illinois, Eastern Division, and by this Court respectively. And respondent filed with said bill of complaint and asked that there be considered as a part thereof certain affidavits. Respondent attaches hereto a copy of said bill of complaint and of the affidavits which were thereto attached and of the two amendments thereto subsequetnly filed, said bill of complaint and amendments and affidavits being marked "Exihibit 1," and also attaches a copy of its motion for a temporary restraining order and preliminary injunction, which is marked "Exhibit 2" and makes said exhibits a part hereof.

(6) Respondent anticipated that upon the action of the Supreme Court in denying respondent's petition for a writ of certiorari being certified to this Court the mandate of this Court to the United States District Court for the Northern District of Illinois, Eastern Division, affirming the judgment and decree of said District Court against this respondent would issue, and that said The Computing Scale Company would thereupon forthwith cause execution to be issued upon said judgment and decree and levied upon respondent's property in said Northern District of Illinois,

and that The Computing Scale Company would forthwith call upon said bonding companies, Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, to pay to it the amount of said judgment and [illegible], and that said bonding companies would pay same forthwith and would at once cash the certificates of deposit which they held as security against their liability upon said bonds, and respondent was advised by its counsel that in their opinion this respondent had exhausted all of its remedies otherwise than by an independent bill in a court of original jurisdiction, and that in order to fully protect respondent against the irreparable loss and injury which would result to respondent if said steps were taken, it was necessary forthwith, to apply to the United States District Court for the Northern District of Ohio, Western Division, for the issuance of a restraining order without notice, and by reason thereof respondent on said 9th day of January, 1922, by its counsel applied to said District Court for the issuance of a restraining order without notice, and thereupon said court issued an order, of which a copy is attached hereto marked "Exhibit 3," and made a part hereof.

(7) Through inadvertence it was not alleged in said bill of complaint that United States Fidelity & Guaranty Company was one of the sureties upon said bond for $450,000.00, and no relief was sought for or obtained by said temporary restraining order against said United States Fidelity & Guaranty Company. On January 11, 1922, an amendment to its bill of complaint (hereto attached as a part of Exhibit 1) was filed by respondent alleging the execution of said bond by said United States Fidelity & Guaranty Company and praying the same relief with respect to that company as was prayed by the original bill of complaint against Fidelity & Deposit Company of Maryland, and in pursuance of the advice of counsel, in order fully to protect its rights, respondent moved the court for the issuance of a temporary restraining order against said United States Fidelity & Guaranty Company as well as against the other defendants, and said order was issued on said date. A copy of said order is attached hereto marked "Exhibit 4" and made a part hereof.

(8) On January 19, 1922, upon the advice of its counsel respondent filed a second amendment to its bill of complaint (hereto attached as a part of Exhibit 1) in said cause in the Northern District of Ohio, Western Division,

making The Summit Trust Company a party defendant, and alleging additional circumstances showing the irreparable loss and damage which respondent would suffer by the enforcement of said judgment against it or against said bonding companies.

(9) On January 19, 1922, there came on for hearing in said cause in the United States District Court for the Northern District of Ohio, Western Division, pursuant to notice to the defendants the motion of this respondent for the issuance of a preliminary injunction. This respondent offered in evidence in support of the said motion its verified bill of complaint and the amendments thereto, the affidavits attached to said bill of complaint and certain additional affidavits, to-wit, the affidavits of Herman C. Singer, George Walker, Albert H. Meads, Albert U. Smith, Joseph McNally, Thomas Z. Phinney and Charles W. Owen, and thereupon the respondent by its counsel asked leave to introduce oral evidence in further support of its said motion for a preliminary injunction. Copies of said additional affidavits are attached hereto marked "Exhibit 5" and made a part hereof.

(10) Upon the beginning of the hearing of this respondent's motion for a preliminary injunction on January 19, 1922, The Computing Scale Company appeared by its counsel John M. Zane, E. R. Effler, and LeRoy Eastman. After this respondent had requested leave to introduce oral evidence, as aforesaid, the court suggested that by reason of the prior engagements of the court it might be necessary to appoint a special master to take the testimony on the motion for a preliminary injunction. The Computing Scale Company by its counsel, Mr. Zane, objected to the appointment of such a master, and Mr. Zane stated in part:

> "We are here ready to answer to this showing that is made by the verified bill and by the affidavits served upon us, and we therefore think that as a matter of right under the statute we are entitled to have the matter proceed."

After considerable further argument on behalf of this respondent by its counsel and in behalf of The Computing Scale Company by its counsel, Mr. Zane stated:

> "We have an answer and we have filed in connection with it three affidavits which simply go to isolated matters stated in the answer, and that is the showing that we make here in answer to the

verified bill and the affidavits. Now it ought not—may I ask to have those filed your Honor—it ought not to require any great amount of time from this court. All the court will have to do here is to pass upon the question as to whether or not this matter has been adjudicated; that is determined by the record."

Thereupon at said point in said proceedings Mr. Zane filed his answer and affidavits, being the same answer filed herein as an exhibit to the petition.

The court upon said hearing in part stated with respect to the claims made by the Computing Scale Company by its counsel,

"We have already entered formally upon the hearing of the application."

referring to this respondent's application for a preliminary injunction; and the court further said in part:

"Now if it is apparent on the face of the record that all there is here, as you say is an attempt to review what has happened in Chicago, of course that will end it very quickly. We won't attempt to do that. The plaintiff in this case has had its day in court on issues that were decided in Chicago and it cannot regain lost ground by any such an application as this, but if it were defeated in that litigation because of impositions upon the court which decided against it, that is a decidedly different issue and the issue is altogether too important to be decided without recourse to every source of information that will enlighten the court."

After considerable further discussion the court said:

"So I am minded to do this—to enter an order right now extending this temporary restraining order within the statute for a period of ten days to give the court a chance to see what there is in this record. If you want to present any views in writing during that period or to file additional affidavits, and do it within a reasonable time, you may do so. If I reach the conclusion that we are not asked to do the absurd thing of reviewing the judgment of the District Court and the appellate courts but have an issue here that is distinctly and substantially different from that already decided, then I will be forced to apoint a special master to take testimony

and continue this hearing, because the issue is too momentous to be forced too rapidly, and we simply cannot take it over. If I reach the contrary conclusion, the plaintiff has its rights of review. I think the court has some latitude of discretion here that permits me to do this, and that is the course I will take with it."

A copy of the transcript of the proceedings on said hearing verified by the stenographers who reported same, is hereto attached, marked "Exhibit 6" and made a part hereof.

A copy of the three printed volumes of the record filed in the Supreme Court of the United States upon the Petition of respondent for Writ of Certiorari was submitted to said court by counsel for The Computing Scale Company on January 19, or 20th in support of said Company's answer in said District Court.

(11) In pursuance of the oral order extending said temporary restraining order made by the court on January 19, 1922, an order was entered on the journal of said court for January 19, 1922, continuing said restraining order in effect for "ten days or until within that time the court may find it possible to give attention to said several matters," referring to plaintiff's motions for a preliminary injunction and for permission to introduce additional testimony in open court, and to defendant's motion to dismiss on the ground of res adjudicata. A copy of said order is hereto attached, marked "Exhibit 7," and made a part hereof.

The writing of said order on the journal in pursuance of said oral order made on January 19th was, as respondent is informed, done on January 20th, owing to the fact that the said hearing was continued until the judge had to leave at once but said oral extension of said restraining order was made from the bench by the court and in the and LeRoy Eastman, of counsel for The Computing Scale presence of John M. Zane, Charles F. Morse, Erwin Effler,

A written order was submitted to counsel for The Company, on January 19th, 1922.

Computing Scale Company on the morning of January 20th ror their approval and no objection or exception was taken thereto by them.

(12) The papers which Mr. Zane asked to have filed upon said hearing, as hereinbefore shown, were the

papers entitled in the said cause designated as, "Separate Answer of the Defendant, The Computing Scale Company," a copy of which has been filed by The Computing Scale Company with this Court marked "Part of Exhibit 2," to which reference is hereby made; and the affidavits of William D. Snyder, Thomas F. Sheridan and Walter A. Scott which appear at pages 42, 44 and 45 respectively of the pamphlet filed with this Court entitled "Exhibits to petition of The Computing Scale Company," reference to which is hereby made.

(13) On or about January 23, 1922, a brief was filed by John M. Zane, and Charles F. Morse, counsel for The Computing Scale Company in said cause, said brief being entitled: "Brief of defendant, The Computing Scale Company, upon motion of plaintiff for a preliminary injunction."

(14) After the entry of said temporary restraining order of January 19th, and while same was in effect, to-wit, on January 26, 1922, this respondent filed with the Clerk of said District Court affidavits of Ira Chase Koehne, Border Bowman and Edward Rector, in support of its said motion for a preliminary injunction, and upon the same day served copies thereof upon the solicitors for the Computing Scale Company. Copies of said affidavits are hereto attached, marked "Exhibit 8" and made a part hereof. On or about January 28, 1922, counsel for this respondent as plaintiff in said cause filed a brief therein in reply to said brief filed by The Computing Scale Company.

(15) Said temporary restraining order of January 19th was effective to and including January 29th. January 29th was Sunday. On January 28th the Judge of said District Court filed in said cause a memorandum opinion, setting forth certain reasons why it was necessary that the temporary restraining order of January 19, 1922, should be continued in effect for a further period of ten days. A copy of said memorandum opinion is attached hereto, marked "Exhibit 9," and made a part hereof. On January 28, 1922, in pursuance of said memorandum opinion, said court entered an order continuing said temporary restraining order in effect until and including February 7, 1922, and at the request of the solicitors for The Computing Scale Company the court included in said order the objections and exceptions made by The Computing Scale Com-

pany to the same. A copy of said order is hereto attached, marked "Exhibit 10," and made a part hereof.

(16) After the entry of said temporary restraining order of January 28, 1922, and while same was in force and effect, to-wit, on February 7, 1922, said The Computing Scale Company filed in said cause the affidavits of Edward Canby, George M. Ludlow and Samuel M. Hastings. Said affidavits bear upon the merits of the controversy presented by the bill of complaint and the affidavits filed by plaintiff in support of its motion for a preliminary injunction. Copies of said affidavits appear at pages 47, 51 and 54 of "Exhibits to petition of The Computing Scale Company" herein, and reference thereto it hereby made.

(17) On February 7, 1922, plaintiff filed in said cause the affidavit of George R. Frye, together with certain scales and parts of scales referred to in and identified said affidavit. A copy of said affidavits is hereto attached marked "Exhibit 11" and made a part hereof.

(18) On February 7, 1922, an order was entered by said United States District Court for the Northern District of Ohio, Western Division, continuing said temporary restraining order in effect for six days, that is, to and including February 13, 1922, and stating the reasons therefor, and ordering that

> "the parties to this case having further affidavit to be filed previous to the determination of the court on the motion of the defendant to dismiss as aforesaid, file said affidavits herein on or before the 10th inst."

A copy of said order is hereto attached marked "Exhibit 12", and made a part hereof.

(19) In pursuance of said order of February 7, 1922, this respondent filed in said cause, on February 10, 1922, the affidavits of James A. Coffey, Paul A. Staley, Walter F. Stimpson, Daniel Meyers, George B. Hoyt and Ira Chase Koehne. Copies of said affidavits are hereto attached marked "Exhibit 13", and made a part hereof.

(20) On February 10, 1922, The Computing Scale Company filed in said cause the affidavit of Oren Britt Brown. A copy of said affidavit is attached hereto, marked "Exhibit 14" and reference thereto is hereby made.

(21) On the same day, to-wit, February 10, 1922, this respondent filed in said cause an additional affidavit by Ira Chase Koehne, for the purpose of meeting the affidavit of Oren Britt Brown filed therein by The Computing Scale Company. A copy of said affidavit of Ira Chase Koehne is hereto attached marked "Exhibit 15" and made a part hereof.

(22) On February 10, 1922, this respondent as plaintiff in said cause in said District Court, filed a written memorandum, same being filed about four o'clock P. M. Eastern Standard time on said day. In said memorandum this respondent said in part:

> "Plaintiff is now satisfied to submit its motion for a preliminary injunction upon the affidavits and exhibits which have been filed herein, requesting leave, however, to complete this record upon the motion by having brought into the record certain exhibits which were in evidence on the first trial in the Chicago litigation."

A copy of said memorandum was served upon petitioner's counsel in Toledo at the time when it was filed.

(23) At five o'clock P. M. Eastern Standard time on said 10th day of February, 1922, and about one hour after the filing of the foregoing memorandum by respondent, respondent's counsel in said cause were notified by long-distance telephone from Chicago of the entry by this Court of its order of February 10, 1922, entered upon the petition of The Computing Scale Company filed herein on said day, and that service thereof had been made on its counsel of record herein about twenty minutes before five P. M. Eastern Standard time on said day. Until this notice was so received neither respondent nor any of its counsel had any notice or knowledge that the petition herein had been filed or that any such proceeding was contemplated On the morning of February 11, 1922, upon receiving a copy of the petition and order herein, respondent's counsel sent the same to the Judge of the District Court before whom the motion for an injunction had been argued, and who then had the motion under advisement.

(24) On the morning of February 13, 1922, the judge of said District Court sent for the Toledo counsel for The Computing Scale Company and for counsel for Toledo Scale Company, and stated in substance that he had

decided to overrule the motions of The Computing Scale Company to dismiss the bill of complaint, and that he was ready to pass upon the motion of Toledo Scale Company for a prelimianry injunction, unless The Computing Scale Company desired further time for the introduction of additional evidence; that if such further time was desired by The Computing Scale Company, it would be given further time upon filing an application therefor in said court, and said Toledo counsel for The Computing Scale Company were requested to ascertain from Messrs. Zane and Morse whether The Computing Scale Company desired additional time for the filing of additional evidence and to advise the court as soon as possible on said 13th day of February, 1922. No application for additional time for the filing of affidavits was made by said The Computing Scale Company. On the contrary on the afternoon of February 13th the Toledo conusel for The Computing Scale Company sent to the Judge of said District Court a communication, of which a copy is as follows:

February 13, 1922.

HON. JOHN M. KILLITS,
United States District Judge,
Toledo, Ohio.

My Dear Judge:—

Re: Toledo Scale Company, Plaintiff, vs. The Computing Scale Company, et al., Defendants.

Since talking with you at noon. I have again communicated with Messrs. Zane, Morse & Marsnall. The defendant, The Computing Scale Company, not waiving objection to jurisdiction set forth in its Answer herein and its special appearance therefor, objects and excepts to any continuation of the temporary restraining order heretofore issued and extended, on the ground that the Court has no jurisdiction to grant said order; that the Court has no power to make or continue the restraining order herein; that any such order or continuation of said restraining order is contrary to Equity Rule 73 and is contrary to Section 17 of the Act of Congress of October 15, 1914.

The Defendant, The Computing Scale Company, does not desire to and does not make any request for an extension of said temporary restraining or-

der, but on the contrary, objects thereto, as hereinabove set forth. Any such extension of said restraining order will be made at the request of Plaintiff, or by the Court of its own motion, over the objections of the Defendant, The Computing Scale Company, as above set forth, as has been the case with each of the orders thus far entered, extending said temporary restraining order.

The Defendant, The Computing Scale Company not waiving the objection to jurisdiction set forth in its answer herein and its special appearance therefor, should Your Honor carry out the intention announced in our conversation today, to overrule Defendant's motion to dismiss, and Defendant's plea of prior adjudication, and grant a preliminary injunction, objects to such action on the ground that the Court has no jurisdiction over the defendant, The Computing Scale Company; that the Court has no power or jurisdiction to enjoin or restrain the enforcement of the decree, the enforcement of which is sought to be restrained and enjoined in this cause, for the reason that said cause in which said decree was rendered is now pending on appeal in the Circuit Court of Appeals of the 7th circuit; that the bill of complaint herein states no case entitling the Plaintiff to any relief in equity; that the bill of complaint herein shows that the Plaintiff has been guilty of such laches as to dis-entitle it of any relief; that the matters and things set forth in said bill of complaint have been heretofore adjudicated by the Circuit Court of Appeals of the 7th Circuit; and on the further ground that the Defendant, The Computing Scale Company has not been granted a hearing on its said motion, on its said plea or on said motion of granting said preliminary injunction; and that any order entered herein has been entered without hearing.

Yours very truly,
(Signed) LeRoy E. Eastman.

(25) Late on the afternoon of February 13th, 1922, and after the receipt of said letter from said counsel, the judge of said District Court caused two orders to be entered in said cause, one denying the motions of The Computing Scale Company to dismiss said action and the other

granting the motion of this respondent as plaintiff therein for a preliminary injunction. Copies of said orders so entered by said court are hereto attached marked "Exhibits 16 and 17," and made a part hereof:

(26) In pursuance of the requirements of said order this respondent as plaintiff in said cause forthwith upon the entry of said order filed its bond in the amount of Fifteen Thousand dollars ($15,000.00), which was approved by said court.

(27) Said court stated its reasons for denying the motions to dismiss respondent's bill and for granting said motions for a preliminary injunction in an opinion filed on February 14, 1922 as of February 13, 1922, by the Honorable John M. Killits, Judge of said court a copy of which opinion is hereto attached marked "Exhibit 18," and made a part hereof.

(28) This respondent further says that its action in giving the said bond on February 13, 1922, was taken in pursuance of the advice of its counsel to the effect that the giving of said bond was necessary in order to protect fully this respondent's rights as against said The Computing Scale Company, and in reliance upon the views of the Judge of said court, which were in brief orally expressed in the presence of counsel for this respondent and for said The Computing Scale Company on said 13th day of February, 1922, prior to the entry of the order of preliminary injunction therein and were further expressed in said order.

(29) Respondent says that by appearing and contesting the merits of said cause as herein shown, said The Computing Scale Company fully submitted its person and all matters in controversy in said cause to said District Court and by its motions to dismiss, its plea of res judicata, its answer to the merits and the evidence offered by it in support thereof, it raised in and submitted to said Court the identical question which it now seeks to prevent said District Court from hearing and to submit to this Court, and that it took all of said actions and received from said District Court (by its memorandum opinion of January 28, 1922) a ruling adverse to its interests and contentions before it filed its petition herein, and respondent further says that by said proceedings in said District Court said The Computing Scale Company is barred and estopped

from attempting to interfere by proceedings in any other Court with the further prosecution of said cause.

(30) This respondent further says that it is not true as alleged in the petition of The Computing Scale Company herein, that the affidavits filed with its bill of complaint in said cause were "in substance the affidavits of 1913 filed in this court"; that it is not true, as stated in said petition, that "Exhibit B" to the plea filed by The Compuing Scale Company in said cause shows the issue on what are called in the petition herein the bills of review in this court and the issue on the bill of complaint in the District Court to be one and the same.

(31) Respondent say that the issue presented by the several applications in this court was merely whether this respondent, as defendant in the original action, should in the exercise of this court's discretion be given an opportunity to introduce certain evidence newly discovered by it, but of which it alleged The Computing Scale Company had at all times had knowledge; whereas the bill of complaint and affidavits presented to the United States District Court for the Northern District of Ohio, Western Division, in the suit brought by this respondent therein against The Computing Scale Company and others, raise the issue that The Computing Scale Company, as a part of a conspiracy in restraint of trade in violation of the United States laws and for the purpose of destroying Toledo Scale Company as a competitor of The Computing Scale Company, entered into and carried out a plan to acquire and suppress the evidence necessary to enable Toledo Scale Company to prove that the patent relied upon by The Computing Scale Company herein was, in fact, invalid by reason of the sale and public use of an identical device more than two years prior to the filing of the original application for said patent; and that having, as The Computing Scale Company believed, succeeded in acquiring and suppressing the evidence necessary to enable the Toledo Scale Company to establish such defense, The Computing Scale Company then filed its bill of complaint in the court below, based upon said patent and claiming infringement thereof; and further raise the issue that the judgment and decree in the court below and the decree of affirmance in this court were obtained by reason of fraud upon respondent and imposition upon the court below and upon this court by said The Computing Scale Company, not merely in failing to disclose

knowledge, but in that it acquired and suppressed and withheld from the respondent and from the court below and from this court the said evidence. As illustrative of the difference between the bill of complaint and the affidavits filed in support thereof in said suit in the United States District Court for the Northern District of Ohio, Western Division and the affidavits and depositions brought to the attention of this court, respondent calls attention particularly to the affidavit of Ira Chase Koehne, filed in said United States District Court for the Northern District of Ohio, Western Division, in which the affiant after relating the circumstances and conditions of his employment by The Computing Scale Company and the obligation which he was under and observed, to maintain secrecy while such employment existed, and after relating certain other activities of The Computing Scale Company in pursuance of its attempt unlawfully to monopolize the scale business and detailing the knowledge of the officers of The Computing Scale Company with respect to the anticipation of the patent sued upon in the court below (Smith Reissue Patent No. 11536) by the public use of a scale made by one Phinney for many years prior to the filing of Smith's original application, states in part:

> "After The Computing Scale Company had acquired said Reissue Patent No. 11536 and the business of said Boston Company it began the manufacture of Computing Scales using a light weight skeleton indicating cylinder covered with paper, claiming to manufacture same under said Reissue Patent No. 11536, and in order to support its claim that it had the exclusive right by virtue of said Reissue Patent No. 11536 to manufacture that type of computing scale The Computing Scale Company instituted a search for scales manufactured by Phinney under his patent No. 106869. Said effort to find and acquire said Phinney scales extended over a number of months and resulted in quite a number of said scales being acquired by The Computing Scale Company, and said Ozias and affiant were of the opinion that all which could be found by The Computing Scale Company had been found and acquired."

Said affiant then further relates the bringing of two suits in the United States District Court for the Eastern District of Pennsylvania upon said Smith Reissue Patent,

the pleading and proof of the prior use of the Phinney scale in said suits, and then states that said Ozias, who was then the general manager of The Computing Scale Company,

> "informed affiant that he had been advised by Church & Church, counsel in said case for The Computing Scale Company, that in their opinion said evidence constituted a complete defense as to the claims asserted by The Computing Scale Company based upon the Smith Reissue Patent No. 11536, with respect to the claims therein based upon a light-weight cylinder covered with light-weight material."

and that

> "said Ozias at said time informed affiant that it had been decided not to press said cases in Philadelphia against the Federal Scale Company and said Randall to trial, because of said evidence which the defendant, the Federal Scale Company, had obtained."

Said affiant in said affidavit further stated in part:

> "After said conversations between Ozias and affiant, said Ozias informed affiant that he, the said Ozias was having a renewed search made for Phinney scales for the purpose of finding all of those which had not been found in the earlier search or produced by the Federal Scale Company, and as a result of said renewed search some additional Phinney scales were found and purchased by said The Computing Scale Company to affiant's knowledge. Affiant and said Ozias then believed that all of said scales which had been sold by said Phinney had been found and acquired either by The Computing Scale Company or were in evidence in said Federal Scale Company case."

* * * * * *

> "Affiant does not recall the exact date of the death of O. O. Ozias, but does recall that it was after the suit had been begun by The Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Eastern Division of the Northern District of Illinois, and shortly before his death said Ozias stated to affiant in substance that he thought they, meaning the

Computing Scale Company, had now succeeded in gathering up all of the old Phinney scales, that they had made a renewed search for them before filing the suit in Chicago, that they thought they had found them all before, but that now he thought all of the scales were out of the way and it was safe to go ahead with the litigation to maintain the validity and infringement of the Smith Reissue Patent.

"Affiant says that at the time the suit of The Computing Scale Company was begun in the Eastern Division of the Northern District of Illinois, and at the time testimony in behalf of The Computing Scale Company was taken therein, Edward Canby, the then President of The Computing Scale Company, O. O. Ozias, the then Vice-president and General Manager of The Computing Scale Company, and Joseph Hopkinson, the then Superintendent or Assistant Superintendent of the Dayton plant of The Computing Scale Company, to affiant's personal knowledge, each knew of the fact that scales had been manufactured by said Phinney with light-weight indicating cylinders of skeleton construction covered with paper more than two years before the Smith original application was filed in the United States Patent Office and that said Phinney scales had been more than two years prior to the filing of said Smith original application sold and used by a number of users; and each of said officers and persons connected with The Computing Scale Company at the times above mentioned, to affiant's personal knowledge, knew of the fact that The Computing Scale Company had purchased or caused to be purchased all of said Phinney scales which it could find, other than those which were exhibits in said Federal Scale suit, and each of said officers and persons connected with said The Computing Scale Company at the times above mentioned knew that said The Computing Scale Company had had in its factory at Dayton, prior to the time said suit was filed in the Eastern Division of the Northern District of Illinois against the Toledo Scale Company a number of said Phinney scales which had been purchased from users thereof, in which said scales said light-weight indicating cylinders covered with paper were used.

"Affiant further says that he knows of his own knowledge that the purpose of the Officers and Directors of The Computing Scale Company in purchasing or causing the purchase of all of the Phinney scales which it could find as hereinbefore set forth was to suppress the same and to deprive persons sued for infringment of the Smith reissue patent No. 11536, including the Toledo Scale Company, of all opportunity to prove that by the manufacture and use of the Phinney scales said Smith patent had been anticipated and was invalid, and that said Edward Canby, O. O. Ozias and Charles James to affiant's knowledge were familiar with said purpose and designs, and affiant was informed by said O. O. Ozias that George Ludlow and Samuel M. Hastings were also familiar therewith."

Respondent says by way of further illustrating the difference between the issues presented to the United States District Court for the Northern District of Ohio, Western Division, and that presented in this court, that it directs particular attention to the affidavit of Border Bowman filed in said United States District Court for the Northern District of Ohio, Western Division, and to the copy of a letter from Messrs. Church & Church under date of November 8, 1906 thereto attached with reference to said suit in the Eastern District of Pennsylvania upon said Smith Reissue Patent, in which Church & Church were counsel for The Computing Scale Company, and particularly to the last paragraph of said letter in which Church & Church state to Staley & Bowman, the Ohio counsel for The Computing Scale Company, refering to said cases in the Eastern District of Pennsylvania, in part:

"The Smith Reissue Patent No. 11536 is in suit in a case which is now rather dormant. The defendant put up a very vigorous defense indeed and we think the outcome of the suit doubtful * * * Testimony was taken showing the public use of the Phinney invention; but the drum of the Phinney scale seems to have been made invariably of a rather heavy material. The drum itself was made up of veneer or cardboard, and the graduated chart was pasted thereon. The defense is rather a dangerous one."

Respondent says that the statement of said Church & Church that "the drum itself was made up of veneer or cardboard", in the Phinney scale, was true only with respect to a very few of said scales; that most of said Phinney's drums, including several of those which are now in evidence before the United States District Court for the Northern District of Ohio, Western Division, have drums made of two layers of paper pasted together. Respondent says that there has never been presented to this court the issue as to the fraudulent conduct of The Computing Scale Company raised by the bill of complaint in the United States District Court for the Northern District of Ohio, Western Division, and the affidavits of Ira Chase Koehne, Border Bowman and many others filed in said court in support of said bill.

(32) Respondent further says that it is not true, as alleged in said petition,

> "that said District Court for the Northern District of Ohio, Western Division, announced that it is the intention of the court to continue said temporary restraining order in force and to appoint a special master to take oral evidence upon said motion for a temporary injunction."

For a correct statement of what the District Court said on said subject the Court is refered to Ex. 6 hereto attached page 128.

(33) Respondent further says that it denies that by the joint answer and petition for affirmative relief filed by Fidelity and Deposit Company of Maryland, and United States Fidelity and Guaranty Company in the District Court for the Northern District of Ohio, Western Division, that said bonding companies showed an understanding with the Toledo Scale Company to support the jurisdiction of said District Court for the Northern District of Ohio, Western Division, and to submit to said jurisdiction and an attempt to interplead The Computing Scale Company and the Toledo Scale Company and to resist liability on the supersedeas bonds given to secure said decree; and denies that there was any such understanding between this respondent and said bonding companies or either of them.

(34) Respondent further says that as to the proceedings taken in the cause entitled, "The Computing Scale Company vs. Toledo Computing Scale Company," in the

District Court for the Northern District of Illinois, Eastern Division, and upon the several appeals therein to this court, the respondent refers the court to the record thereof now on file in this court; and as to the proceedings had in said United States District Court for the Northern District of Ohio, Western Division in the case entitled, "Toledo Scale Company vs. The Computing Scale Company, et al." respondent refers the court to the copies of the pleadings, orders, affidavits and other papers filed therein which are attached hereto or are referred to herein.

(35) This respondent further says that it is advised by counsel and therefore asserts that this court is without jurisdiction to consider an independent bill on the ground set forth in this respondent's bill of complaint filed in said District Court for the Northern District of Ohio, and that the relief therein sought cannot be obtained in this court. Respondent denies that the filing of said bill of complaint and the obtaining of said temporary restraining orders by said Toledo Scale Company in said United States District Court for the Northern District of Ohio Western Division constitute and are a violation of the jurisdiction of this Court in any respect; denies that said acts of respondent are a fraud upon the jurisdiction of this writ; denies that such actions or any of them are taken for the purpose of presenting to said District Court for the Northern District of Ohio Western Division "a pretended suit" for relief, based solely or in part upon grounds that have already been adjudicated by this Court upon the merits thereof; denies that said proceedings are for the purpose of presenting to said District Court a pretended litigation by making parties to the bill residents of said District, who are not necessary or proper parties, in order to give said court jurisdiction over The Computing Scale Company; denies that said proceedings are an abuse of the order of this Court granting a stay of mandate, and denies that said proceedings are a contempt of the process and authority of this Court by said Toledo Scale Company.

(36) This respondent further denies that by any procedings taken in said suit its counsel intends to and will prolong this litigation upon an issue already adjudicated by this Court; denies that its counsel ever so stated; denies that whether a special master be appointed upon the motion for a preliminary injunction or not, The Computing Scale

Company will be exposed to great and irreparable, or any loss, damage and injury and alleges on the contrary, that the only damage which said The Computing Scale Company can suffer by reason of delay in obtaining payment of said judgment and decree consists of loss of interest thereon, and that said The Computing Scale Company is secured against any such loss by surety bonds in ample amount given in this Court and in said District Court.

(37) Respondent denies that at the time it filed its petition herein The Computing Scale Company could apply for redress to no other court than this Court.

(38) Respondent further says that it has not taken, and has had no intention of taking any act in disobedience of any order of this Court or in any manner trespassing upon the jurisdiction and authority of this Court; that it has not taken and has had no intention of taking any action to obstruct the administration of justice or to impede the execution of the orders and judgments of this Court; that it believes and now asserts that it had and has the right to and it did in good faith begin and prosecute its suit and respectfully submits that there is nothing in its conduct in the premises which should move this court to take any proceedings herein.

Wherefore, having fully answered, Toledo Scale Company prays that the petition of The Computing Scale Company herein may be dismissed and that the rule issued thereon by this Court of February 10, 1922 may be discharged and that this respondent may go hence without day.

TOLEDO SCALE COMPANY

By .....
President

.....	.....
.....	.....
.....	.....
Of Counsel	*Solicitors for Toledo Scale Company*

STATE OF OHIO ss
LUCAS COUNTY

Henry Theobald being first duly sworn, upon his oath

says that he is President of Toledo Scale Company, the respondent herein; that he has read the foregoing answer and knows its contents, and that the same is true in substance and in fact.

.....

Sworn to before me and subscribed in my presence, this day of February, 1922.

.....

Notary Public, Lucas County, Ohio.

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EXHIBIT I.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, The Commerce Guardian Trust and Savings Bank and The Guardian Savings and Trust Company,

Defendants.

BILL OF COMPLAINT

1. The plaintiff, Toledo Scale Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersy and is a citizen and a resident of said State.

The defendant, The Computing Scale Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio and is a citizen and resident of said State and of the Southern Federal Judicial district thereof, having its principal office and place of business in the City of Dayton, County of Montgomery, in said Southern District of said State.

The defendant, Fidelity and Deposit Company of Maryland, is a corporation organized and existing under and by virtue of the laws of the State of Maryland and is a citizen and resident of said State.

Each of the defendants, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, and Northern National Bank of Toledo, Ohio, is a national banking association established under the laws of the United States, and each of said three defendant is located at the City of Toledo, in the Western Division of the Northern Federal Judicial District of the State of Ohio, and each of said defendants is, for the purpose of such an action as this, by law required to be deemed a citizen of said State of Ohio, and each of said three defendants

is a resident of the said Western Division of said Northern District of said State.

The defendant, The Commerce Guardian Trust and Savings Bank is a corporation organized and existing under and by virtue of the laws of the State of Ohio as a savings bank and trust company, and has its principal place of business in the City of Toledo in the Western Division of the Northern Federal Judicial District of said State, and is a citizen of said State and a resident of said Western Division of said Northern District of said state.

The defendant, The Guardian Savings and Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio as a savings bank and trust company, and has its principal place of business at the City of Cleveland, Ohio, in the Eastern Division of the Northern Federal Judicial District of said State, and is a citizen and a resident of said State of Ohio.

2. The matter in controversy herein exceeds exclusive of interest and costs, the sum of Five Thousand Dollars.

3. The name of the plaintiff, Toledo Scale Company, was formerly Toledo Scale & Cash Register Company and afterwards Toledo Computing Scale Company, and under its said former names and its present name plaintiff has been continuously since July 12, 1901, and now is engaged in the manufacture of computing scales, and among other kinds of computing scales plaintiff has manufactured and for a number of years has had a large and increasing business in the manufacture of a computing scale of which one of the component parts was a cylinder carrying figures indicating weights and values. The defendant, The Computing Scale Company, has also for many years been engaged in the manufacturing of computing scales, including scales having as a component part thereof a cylinder carrying figures indicating weights and values; and plaintiff and said defendant have been competitors in the production of computing scales for many years.

The defendant The Computing Scale Company since some time prior to 1901 has been continuously engaged in an effort to monopolize, in violation of the laws of the United States, the business of manufacturing computing scales and as soon as plaintiff began to compete with it, said defendant in pursuance of its attempt and purpose to monopolize aforesaid formed and entered into a conspiracy to

which its officers and directors and said Moneyweight Scale Company were parties, the design and purpose of which was to ruin plaintiff and drive it out of business, in pursuance of which it did all of the several acts and things hereinafter set forth.

4. In the year 1902 and for several years thereafter, the defendant The Computing Scale Company, was engaged in the manufacture of a computing scale which was so arranged and constructed as to give the dealer or person using same for weighing the amount and computing the price of goods sold an unfair and dishonest advantage over the persons purchasing on the basis of such computation. Said defendant manufactured large numbers of said dishonest scales and in the effort to overcome the competition offered by the honest and fair scales manufactured and sold by plaintiff said defendant advertised and caused and permitted the Moneyweight Scale Company of Chicago, its general distributor of said scales, and the respective agents and salesmen of itself and of said company to advertise the fact of the dishonest advantage which the users of such scales would have by reason of the construction thereof. One of said advertisements was to the effect that one dealing in meat might buy meat at nine cents a pound, retail the meat to his trade at the same price and get his money back, and three per cent profit besides. Plaintiff exposed the unfair and dishonest character of the said make of scales so manufactured and sold by said defendant, The Computing Scale Company, with the result of greatly increasing the malicious hatred of said The Computing Scale Company for plaintiff and of intensifying its efforts to bring about plaintiff's ruin in pursuance of the conspiracy hereinbefore set forth. Thereafter said The Computing Scale Company sought to obtain an injunction to restrain this present plaintiff from further distributing such circulars. Said suit was filed in the United States Circuit Court for the Southern District of Ohio and was heard on appeal by the United States Circuit Court of Appeals for the Sixth Judicial Circuit, which held that this plaintiff should not be restrained from putting out said circulars exposing the dishonesty of said make of scale made by said defendant, The Computing Scale Company, for the reason, in substance, that the said scales were in fact dishonest. Said decision of the Circuit Court of Appeals is reported in Vol. 142 Federal Reporter, page 919, and a subsequent decision of the District Court to the same effect was

rendered June 30, 1914, which has been published, and plaintiff makes reference thereto for greater particularity.

5. In further pursuance of said conspiracy and design said The Computing Scale Company claimed and advertised in the years 1902 and 1905 that a certain so-called "fan" scale manufactured by plaintiff was an infringement of one manufactured by said defendant and the plaintiff's said scale was an imitation and that said defendant's scale was the original, whereas the plaintiff's said scale was in fact the original and defendant's said scale the imitation; and said defendant further brought a number of suits against plaintiff and its customers in the year 1905 for said alleged infringements and widely advertised the bringing of such suits, but finally dismissed same or permitted them to be dismissed without trial and in further pursuance of said malicious and wrongful conspiracy and design said defendant in the years 1907 and 1910 instituted the suits for alleged infringement of patents against this plaintiff hereinafter set forth, well knowing said suits to be based upon false and fraudulent claims; and in connection with said suits was guilty of fraudulent acts and conduct hereinafter related; and solely by reason of said fraudulent conduct and imposition upon and deception of the courts and this plaintiff, said defendant obtained (as hereinafter more fully set forth) a judgment against this plaintiff in the amount of Four Hundred Twenty Thousand Eight Hundred Eighty Three and 44/100 ($420,883.44) Dollars for infringement of a certain patent of which said The Computing Scale Company claimed to be owner. Said defendant The Computing Scale Company, knew, at all times that it was prosecuting said litigation against this plaintiff, that its said patent was invalid and that if the evidence which it had suppressed and kept from this plaintiff and from said courts had not been so suppressed, that said courts would not and could not have found the said judgment or any judgment in favor of said The Computing Scale Company and against this plaintiff on said claim of infringement.

6. The suits commenced by said The Computing Scale Company against this plaintiff, with the malicious design and conspiracy and purpose hereinbefore set forth, consisted of two suits commenced in the year 1907 filed in this court, one alleging infringement of Reissue Patent No. 11536 and the other of Original Patent No. 597300, and of a suit filed in the District Court of the United States for the Northern

District of Illinois, Eastern Division, on or about May 23, 1910, based on both of said patents. The said suits begun by said The Computing Scal Company in this court were permitted by that company to pend for several years without any evidence being taken and without any decree being entered. Plaintiff is informed and believes and therefore avers that said suits were not pressed by said The Computing Scale Company for the reason that it had not then succeeded in obtaining possession of and making arrangements for the suppression of the evidence which demonstrated the falsity of its said claims, of which evidence said defendant The Computing Scale Company had knowledge as hereinafter set forth.

7. On or about October 5, 1901, said defendant The Computing Scale Company brought suit against the Federal Scale Company in the United States Circuit Court for the Eastern District of Pennsylvania, alleging infringement of certain letters patent by said Federal Scale Company, including said re-issue letters patent No. 11536, dated April 28, 1896 and original letters patent No. 597300 dated January 11, 1898, each granted to Albert U. Smith. In said suit the defendant, The Federal Scale Company in its answer set up among other defenses letters patent of the United States No. 106869, granted August 30, 1870 to William H. Phinney, and alleged a prior invention and use by said Phinney of scales embodying the inventions of the patent sued upon, including said reissued Patent No. 11536. In said cause, depositions were taken showing the manufacture and sale by said Phinney of scales under his patent above mentioned, and three of said Phinney's scales were produced and introduced in evidence. Said reissued patent No. 11536 relied upon by The Computing Scale Company purported to be a patent of a light weight cylinder. Said patent had been taken out by one Smith and the novelty of said Smith patent was claimed to be in the fact that the cylinder was to be of a skeleton construction covered with light weight material, and the cylinder and covering to be of very light weight. The said Phinney patent covered a cylinder but did not prescribe that it should be light; but the scales actually manufactured by said Phinney and put in use, and three of which were exhibits produced and identified in the evidence in said case in the Eastern District of Pennsylvania, in fact embodied a light weight skeleton cylinder substantially identical with that called for by the Smith patent. Said manufacture of said computing scale with said light

weight cylinder by said Phinney was a complete anticipation of the claims of said reissued patent of said Smith upon which The Computing Scale Company relied, and said evidence constituted and was a complete defense on behalf of said The Federal Scale Company against said claims of The Computing Scale Company, and was so recognized by said The Computing Scale Company and its counsel in said suit. After said depositions were taken and said Exhibits produced by the defendant in said suit the complainant did not prosecute said suit against the Federal Scale Company further, and its counsel and counsel for the Federal Scale Company entered into a stipulation by which stipulation the proofs and exhibits in said case were not filed of record but were to be left in the custody of the counsel for the party on whose behalf they were presented respectively. Said Federal Scale Company to one of counsel for said The Computing Scale Company, defendant herein, and remained and were in the possession of said counsel for said The Computing Scale Company, as plaintiff is informed and believes and therefore avers for a number of years and until long after the time had expired within which this plaintiff as defendant could introduce evidence in said suit by The Computing Scale Company against this plaintiff as defendant in the United States District Court for the Northern District of Illinois, Eastern Division. Said defendant herein, The Computing Scale Company, ultimately dismissed or permitted the dismissal of its bill of complaint against The Federal Scale Company, without submitting the merits of its claims on said patents in said suit.

8. In the year 1901 the defendant herein, The Computing Scale Company, instituted a suit upon the Smith patent hereinabove mentioned and another against one Richard T. Randall in the Circuit Court of the United States for the Eastern District of Pennsylvania. In that case, also an answer was filed setting up the said Phinney patent 106869 and alleging a prior invention and use by said Phinney and others of scales embodying the invention of the patents sued upon, and said The Computing Scale Company abandoned said litigations without ever bringing the same to trial.

9. After said depositions had been taken and said exhibits had been produced in said suit in the Eastern District of Pennsylvania against The Federal Scale Company, which was in the year 1902, the solicitors and counsel for said The Computing Scale Company in said sult, as plaintiff

is informed and believes and therefore avers, refused to prosecute said suit further on its behalf and declined to bring further suits on behalf of said The Computing Scale Company based on alleged infringements of said Smith reissued patent No. 11536, and as plaintiff is informed and believes and therefore avers said counsel advised said The Computing Scale Company that no suit for alleged infringement of said patent could be successfully maintained because of the prior manufacture, use and sale of said computing scales with light weight skeleton cylinders under the Phinney patent hereinbefore mentioned. Said suits in the Eastern District of Pennsylvania were dismissed in 1913.

10. About the year 1906 plaintiff herein engaged in the manufacture of a cylinder computing scale using a light weight skeleton cylinder, and thereupon said defendant The Computing Scale Company claimed and advertised that said scale so manufactured by this plaintiff was an infringement on patents owned by said defendant The Computing Scale Company, and said defendant The Computing Scale Company shortly thereafter ~~filed suit in the~~ United States District Court for the Northern District of Ohio, Western Division against this plaintiff as defendant, alleging that plaintiff by the manufacture of said scale was infringing patents owned by said The Computing Scale Company, including said Smith reissued patent No. 11536. The pendency of said action was widely advertised by said The Computing Scale Company in pursuance of said conspiracy and design to injure and destroy plaintiff's business, but said action was not brought to trial. Said suit was not brought by the solicitors who had represented said The Computing Scale Company in said suit in the Eastern District of Pennsylvania. While same was pending, said The Computing Scale Company, through its officers, agents and representatives in further pursuance of said conspiracy secretly engaged in an effort to find all of the Phinney scales which had been manufactured with said light weight skeleton cylinder and which were not already in its factories and in the custody of said Company's counsel in said case against The Federal Scale Company, and said The Computing Scale Company did locate and secretly purchase and take into its possession a number of said Phinney scales, the exact number being to this plaintiff unknown but well known to the defendant The Computing Scale Company. Said scales so purchased and taken into possession were, as plaintiff is informed and believes and therefore avers, all of which

it could obtain possession and all but one or two of said Phinney scales which were then in the hands of users thereof. The purpose of said The Computing Scale Company in so searching for and purchasing and taking possession of said scales was to and it did destroy or secrete the same and thus suppress and keep from this plaintiff and from the courts in which said The Computing Scale Company had brought or might bring suits all knowledge of the fact that the said Smith reissued patent No. 11536 was invalid because of the prior invention and public use of a substantially identical device manufactured by said Phinney under his patent aforesaid.

11. After said The Computing Scale Company had, as aforesaid obtained possession of, secreted and destroyed substantially all of the scales manufactured under the Phinney patent aforesaid, said The Computing Scale Company still in pursuance of its design to injure and destroy plaintiff's business instituted another suit against this plaintiff in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, being Cause No. 30024, in equity, for the alleged infringement by said Toledo Scale Company, this plaintiff, of said Smith reissued patent No. 11536 and of a certain original patent No. 597,300, which said The Computing Scale Company in its bill of complaint in said case claimed to own. The solicitors and counsel for The Computing Scale Company in said suit were not the solicitors who had represented it in said suit for the Eastern District of Pennsylvania or in this court. Plaintiff is informed and believes and therefore avers that said The Computing Scale Company did not inform its said solicitors and counsel in said cause No. 30024 of the facts with reference to the prior use of the light weight skeleton cylinder under the Phinney patent, of which it had full knowledge as hereinabove set forth, and caused its said solicitors and counsel to prepare and file on its behalf in said suit in said Eastern Division of the Northern District of Illinois a bill of complaint in which it was alleged that one Albert U. Smith, before the 30th day of July 1897.

> "became and was the original, first and sole inventor of certain new and useful improvements and inventions in price scales, fully shown, described and claimed in Letters Patent of the United States hereinafter mentioned, which improvements in price scales were not known or used by others in this country and not patented or described in any printed pub-

lication in this or any foreign country before his invention or discovery thereof, and not in public sue or on sale in the United States for more than two years prior to his application for letters patent and which had not been abondoned to the public."

As the officers of said The Computing Scale Company, including O. O. Ozias then Vice-President of said Company, who verified said bill of complaint, then well knew, said statement and each and every part thereof was false in so far as it related to said reissued Letters Patent No. 11536, and said The Computing Scale Company caused said statement to be made in said bill of complaint and said suit to be filed only because of the belief of said The Computing Scale Company that it had so completely and successfully suppressed and secreted the evidence necessary to demonstrate the falsity of said statement as that plaintiff herein as defendant therein could not prove the true facts. Original patent No. 597300 need not be further mentioned herein for the reason that same was held invalid in said litigation and the bill of complaint of said The Computing Scale Company dismissed as to said patent by order of the Circuit Court of Appeals for the Seventh Circuit, whereby the rights of the parties to said suit were made to depend wholly upon the question as to the validity of said reissued patent No. 11536, which question in turn depended wholly upon the question as to whether any computing scale having a light weight skeleton cylinder had ever been built and placed in usage prior to the issuance of said reissued patent No. 11536.

12. In the answer to this plaintiff as defendant in said suit in said Eastern Division of the Northern District of Illinois it is alleged among other defenses, that prior to the alleged invention of said scale by said Smith that the said inventions and improvements had been patented and described in Letters Patent issued by the United States No. 106869 granted to William H. Phinney and had been used by him and others. In the said Phinney patent, however, the patentee had neglected to specify that the cylinder should be of light weight or skeleton construction covered with light weight material, although, as aforesaid, the scales constructed by said Phinney under said patent were, in fact, of that construction. It was claimed in said suit by counsel for The Computing Scale Company that said Smith reissued patent constituted a valid patent covering a new invention and improvement in scales by reason of the fact that said Smith

was the first person to discover the fact that a light weight cylinder was necessary for an accurate and useful computing scale and that prior to said discovery and the construction of a scale with such a cylinder by said Smith, no one, either Phinney or any one else, had ever constructed a practicable, useful and accurate computing cylinder scale. Plaintiff is informed and believes and therefore avers that the counsel for The Computing Scale Company as plaintiff in said case were in good faith in making said claim and in introducing in evidence the testimony of a number of witnesses in support thereof, said counsel, as plaintiff is informed and believes and therefore avers, having been kept in ignorance of the true facts by said The Computing Scale Company as aforesaid. Certain of said witnesses may have testified in good faith by reason of lack of knowledge upon their part that there had been any use prior to Smith invention and patent of any computing scale having a light weight skeleton construction. Other witnesses, however, and among them certain officers of The Computing Scale Company, plaintiff is informed and believes and therefore avers, had full knowledge of the manufacture and use of the Phinney scale with said cylinder of light weight skeleton construction as hereinbefore set forth but notwithstanding such knowledge falsely testified that there had been no such prior use of any such scale.

13. Prior to the beginning and during the taking of testimony in said suit brought by the defendant herein, The Computing Scale Company, against this plaintiff in the United States District Court for the Northern District of Illinois, Eastern Division, plaintiff herein made most diligent efforts to ascertain the state of the prior art with reference to the patents relied upon by said The Computing Scale Company in said suit, including the said Smith reissued patent, and plaintiff spent thousads of dollars in said investigation, both in the searching of records and the investigation of information as to the manufacture of scales by various persons and corporations. Through the records of the Patent Office plaintiff learned of said Phinney patent, which, as aforesaid, called for a cylinder but did not specify a light weight or skeleton cylinder. By reason of the fraudulent activities of the defendant, The Computing Scale Company, herein set forth, plaintiff was not able to and did not, notwithstanding diligent efforts upon its part, learn of the manufacture, use or existence of any scales made by said Phinney or under the said Phinney patent, and no information was given to plaintiff or any of its representatives by

counsel for the defendant, The Computing Scale Company, or by any person connected with said Company or by any of the counsel for the Federal Scale Company, or said Randall of the evidence and exhibits which had been produced in the suits hereinbefore mentioned theretofore brought by The Computing Scale Company; and plaintiff had no knowledge or information from any source whatsoever of the said two suits brought by said The Computing Scale Company in Eastern District of Pennsylvania or of the defenses made therein or of the evidence or exhibits therein introduced. Plaintiff is informed and believes and therefore avers that in pursuance of its fraudulent and malicious design and conspiracy to ruin and destroy plaintiff by asserting an unfounded and fraudulent claim against it, as aforesaid, the defendant, The Computing Scale Company, made some arrangements, the exact details of which are to plaintiff unknown but well known to said defendant, The Computing Scale Company, by which said evidence and exhibits were not made a matter of record and were kept secret so that they did not come to the knowledge of the plaintiff herein.

14. By reason solely of the fraudulent acts and conduct of said The Computing Scale Company as herein set forth, the Toledo Scale Company, plaintiff herein, as defendant in said suit in said Eastern Division of the Northern District of Illinois, was unable to and did not obtain any knowledge or information of the true facts with respect to the manufacture and use of the Phinney scales until after the decree of said District Court had been entered sustaining the validity of the alleged patents of the plaintiff, The Computing Scale Company, in said suit, and finding that the plaintiff herein as defendant therein had infringed said patents. Plaintiff herein as defendant in said suit was, by reason of the acts of The Computing Scale Company, plaintiff therein unable to and did not raise any issue in the evidence as to the prior manufacture and use of scales under said Phinney patent with a cylinder of light weight skeleton construction and was unable and did not offer any evidence contesting the claims of The Computing Scale Company that there never had been any such manufacture and use.

15. As a result solely of said fraudulent practices and conduct upon the part of said The Computing Scale Company and its co-conspirators aforesaid it was successful in obtaining a decree from said District Court for the Eastern Division of the Northern District of Illinois against this

plaintiff as defendant in said suit sustaining the validity of said two Smith patents and finding this plaintiff to have infringed same. This plaintiff as defendant in said suit duly prosecuted an appeal from the order and decree of said District Court of the United States to the United States Circuit Court of Appeals for the Seventh Judicial Circuit and said appeal was submitted to said court upon the briefs and argument of the counsel for the parties.

16. In the brief for The Computing Scale Company filed by its solicitors in said proceedings on appeal, statements were made of which the following are examples:—

"The third class of scales, namely automatic computing scales, *never existed until Smith devised the structure set forth and claimed in reissue patent* 11536." (Brief page 3).

"Examination of the many witnesses produced in this case *failed to show that any scales had ever been built by Phinney* * * * * * * Neither the Phinney nor the Babcock patent contains any allusion whatever to the necessity of making the revolving drum of extreme lightness, and subsequent developments demonstrate that *neither of them know that the revolving drum of such a scale must be light in* order to make the difference between failure and success." (Brief page 4.)

"The fallacy of this argument" (That Smith's cylinder differed merely in degree) " is apparent when it is tested by the fact that *scales constructed by Smith* in accordance with Claims 5 and 6 of the reissue patent *were absolutely the first successful automatic computing scales, and there were, therefore, no earlier automatic computing scales which Smith could vary a degree or in which he could make a substitution of materials.*" (Brief page 8.)

"According to the memory of many witnesses, both for the complainant and the defendant. *no automatic computing scale with an indicating drum was put on the market before the Smith scale,* lawfully manufactured in connection with the Smith reissue patent in suit." (Brief p. 11.)

"Having made this discovery, he (Smith), proceeded further and *devised and disclosed means for relieveing the mechanism of a computing scale of that excessive weight which had prevented such scales from being a success.*" (Brief Page 12, 13.)

"It has been contended in argument by defendant that whenever the occasion arose for making a light drum it was merely a matter of mechanical skill to provide such a light cylinder. It is to be borne in mind, however, that this occasion never did arise until *Smith discovered that the failure of prior automatic computing scales was due to the excessive weight of the mechanism.* It required his discovery to cause this occasion to arise. For a quarter of a century prior to Smith's invention the occasion had arisen for constructing automatic computing scales and inventors had tried to construct them but *they did not know wherein the difficulty consisted, and it remained for Smith to discover the source of that difficulty and remedy it.*" (Page 13.)

"Now, whatever you choose to call it, the ultimate difference between the scales of the Phinney and Babcock patents on the one hand and the scale of the Smith patent on the other hand, is that the former were absolute failures and the latter was a marvellous success." (Page 59.)

"The record in this case establishes:—

1. That no automatic computing scale existed prior to the date of Smith's invented.

2. * * * * * * * * * *

3. That numerous unsuccessful attempts had been made to meet this demand including the efforts of the patentees Phinney and Babcock and the unsuccessful effort of the veteran scale maker Culmer to construct a scale according to the instruction of the Phinney patent * * * * * *(Brief page 47.)

Plaintiff is informed and believes and therefore avers that counsel for The Computing Scale Company made such statements in their brief in good faith, believing them to be true in the absence of evidence to the contrary in the record, but plaintiff says that such lack of evidence existed only because this plaintiff as defendant in said District Court was deprived by the fraud of the plaintiff therein, The Computing Scale Company of the opportunity and evidence necessary to prove the true facts as hereinabove set forth.

17. Notwithstanding the true facts with respect to the earlier manufacture by Phinney of a scale with a light weight cylinder or indicating drum and the successful use

thereof as hereinbefore set forth, the solicitors for this plaintiff as appellant upon said appeal in said proceedings in the Circuit Court of Appeals for the Seventh Circuit were by reason of the fraudulent conduct of The Computing Scale Company as hereinbefore set forth, unable to dispute the claims made by said The Computing Scale Company as hereinbefore set forth, and as the solicitors for this plaintiff as such appellant had no knowledge of the manufacture and use of said light weight cylinder or indicating drum by said Phinney, they stated among other things in their brief for this plaintiff as appellant, referring to the Phinney patent and another patent,

> "Inasmuch, however, as those patents do not specify the particular materials employed by Smith, it may be conceded for the purposes of the argument that the materials specified in the Smith patent are different from those employed by the earlier patentees, and that the indicator drum of his scale is correspondingly lighter."

Said admission, while entirely justified by the state of the record and of the information which this plaintiff's counsel by most diligent effort had been able to obtain, was contrary to the real facts of which said The Computing Scale Company had knowledge and which it had suppressed and kept from this plaintiff as aforesaid. In the petition for rehearing which was filed by counsel for this plaintiff as appellant in said proceeding in said Circuit Court of Appeals for the Seventh CiCrcuit, it was stated among other things that "the record contains no proof that anyone ever constructed a scale in accordance with either the Phinney or the Babcock patent * * * *". This statement was correct and the record in fact contained no such evidence, but such evidence was absent therefrom only and solely because of the fact that said The Computing Scale Company had obtained possession of and otherwise suppressed said evidence as hereinbefore set forth.

18. Upon considering the record upon said appeal said Circuit Court of Appeals filed an opinion sustaining the validity of said reissued patent No. 11536. Said patent was sustained by said Circuit Court of Appeals upon the sole ground that as disclosed by the record before them the light weight cylinder was the invention of said Smith, and that until he had discovered the necessity for a light weight cylinder no one had ever made or used a successful compu-

ing cylinder scale. In the course of the opinion of said Circuit Court of Appeals they use the following expressions:

> "In this record the greatest thing is the fact that Smith put in the hands of the world's vendors of commodities the first useable automatic computing scale. Long before Smith's time, and the length of the interval is a fact of considerable weight, the paper art (Phinney's patent No. 106869 in 1870 and Babcock's no. 421805 in 1890) had professed to teach practical scale makers how to build automatic computing scales. But when this disclosure was given material bodies, failure was the result."
>
> "In the prior art were combinations of indicator drums and weighing mechanisms. But the cause of their failure might lie at any one of many points. It remained for Smith to discover that the most essential thing in reorganizing the old elements was to make the drum so light that its interference with the weighing operation would be eliminated."
>
> "Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course lessening of weight is a matter of degree; If the change converts failure into success, something more than a matter of degree is involved."
>
> "The quoted part of the applicant's original description shows that the idea of the light drum the purpose to be accomplished by it, and the means by which it was to be produced, constituted the principal part of his invention."

19. The conclusions brawn by said United States Circuit Court of Appeals for the Seventh Circuit, and upon which it based its decision that said Smith patent No. 11536 was valid, were based, of course, solely upon the record which was then before that court, which recorded by reason of the fraudulent conduct of The Computing Scale Company and its co-conspirators aforesaid was, as hereinbefore shown, barren of any evidence showing the manufacture under the Phinney patent and the sale and long continued successful use of computing scales having a light weight cylinder or indicating drum substantially identical with that claimed by said The Computing Scale Company to have been invented by Smith. The true facts with respect to the prior manufacture and successful use of such a computing scale with

such a light weight cylinder were the exact opposite, as herein before set forth, of those upon which the court based its opinion sustaining the Smith patent, and the act of said The Computing Scale Company in urging upon said court the validity of said Smith patent upon such ground, and in seeking and obtaining from said court said opinion based on said claim, constituted a fraud and imposition upon said United States Circuit Court of Appeals for the Seventh Circuit, as well as upon this plaintiff.

20. In the said opinion of said United States Circuit Court of Appeals it was further held that Smith patent No. 579300 was invalid, and the bill of complaint of said The Computing Scale Company, so far as said patent was concerned was ordered dismissed. Said court further found that although said Smith reissued patent said Smith reissued patent No. 11536 was valid The Company, as plaintiff in said suit, had failed to prove title thereto in itself. Said Court of Appeals therefore reversed the decree of the District Court of the United States in said cause in favor of The Computing Scale Company and remanded said cause to said District Court "with the direction to dismiss the bill on the second patent No. 579300 and to permit complainant to introduce proof of title to the first patent reissued No. 11536."

21. In the year 1911 after the filing of said suit against this plaintiff by said The Computing Scale Company in the United States District Court for the Eastern Division of the Northern District of Illinois said The Computing Scale Company instituted a suit against the Standard Computing Scale Company in the District Court of the United States for the Eastern District of Wisconsin. In said suit said The Computing Scale Company asserted an infringement by the defendant therein of said Smith reissued patent No. 11536 and original Patent No. 579300. An answer was filed in said suit by the Standard Computing Scale Company in which it alleges as a defense the Phinney patent and later by amendment to said answer the prior manufacture and use of scales embodying same and said suit was never brought to trial by said The Computing Scale Company and was ultimately caused or permitted to be dismissed by said company notwithstanding it had obtained, prior to such dismissal, the decree hereinbefore mentioned from the United States Circuit Court of Appeals for the Seventh Circuit sustaining the validity of said Smith reissued patent

No. 11536 in said suit brought by The Computing Scale Company against this plaintiff.

22. During the pendency of this plaintiff's appeal in said United States Circuit Court of Appeals for the Seventh Circuit and shortly before the decision of said court, one of the solicitors for this plaintiff, the appellant in said court, was informed by one of the counsel for said Standard Computing Scale Company that he, the said counsel for said Standard Company, had learned accidentally long after said Standard Company had filed its answer that there had been some scales manufactured under the Phinney patent, and that said scales had very light computing drums whose shells or cylinders were formed of paper. Thereupon the counsel for this plaintiff as appellant in said proceedings made a diligent investigation and search with respect to said matter, and found that William H. Phinney, the patentee, had then been dead for some ten years, but that his son, Thomas Z. Phinney, (who had in the meantime removed to another city from that in which said William H. Phinney had lived and manufactured said scales) had been familiar with his father's invention and patent and with the scales manufactured under them, and said counsel obtained an affidavit from said Thomas Z. Phinney. Said counsel learned from said Phinney of the fact that he and a number of other witnesses familiar with the facts relating to his father's old scales had been examined concerning them on behalf of the defendant in some suit which he believed to have been pending at Philadelphia, and learned from said Phinney the name of the counsel for the defendant in said Philadelphia suit, and upon further investigation said counsel found the facts relative to the bringing of the suit against the said Federal Scale Company and The Computing Scale Company, the taking of testimony therein, and that the prosecution of said suit had afterwards been abandoned.

Said counsel obtained a number of affidavits with respect to the manufacture by said Phinney of successful computing scales of the types and embodying the light weight cylinders aforesaid and of the use of said cylinders by a number of storekeepers and others, and also obtained an affidavit from the counsel for the Standard Computing Scale Company in which said counsel showed that his discovery of the fact that said Phinney had manufactured said computing scales with said light weight cylinders was accidental; and

therefore counsel for this plaintiff as appellant in said cause moved the Circuit Court of Appeals for leave to dismiss its appeal as to the reissued patent in suit in order that the District Court might entertain an application to re-open this cause for newly discovered evidence. This motion was denied by Circuit Court of Appeals.

23. After the Circuit Court of Appeals for the Seventh Circuit had handed down its opinion as hereinbefore set forth this plaintiff as appellant in said proceeding in said court filed its motion supported by affidavits that said court should include in its mandate to the District Court permission to "entertain and consider, and if so advised, to grant an application of the defendant for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissue letters patent in suit in said cause and to re-hear said cause on such additional proofs." Said motion was denied by said Circuit Court of Appeals. This plaintiff as appellant in said proceeding did not request said modification of said mandate or any other relief from said Circuit Court of Appeals on the ground that The Computing Scale Company had fraudulently deprived the plaintiff of the opportunity to present its defense by purchasing and secreting the Phinney scales for the reason that it had not then discovered the fraudulent acts and suppression of evidence by said The Computing Scale Company in said respects hereinbefore set forth.

24. Upon said cause coming on for hearing in the District Court of the United States for the Eastern Division of the Northern District of Illinois in pursuance of said mandate from said United States Circuit Court of Appeals said District Court heard additional evidence with respect to the title of said The Computing Scale Company to said reissued patent No. 11536 and upon such hearing found that proof of such title had been made by said The Computing Scale Company and thereupon referred said cause to a Master to hear and determine and report to the court the amount which said The Computing Scale Company was entitled to recover from this plaintiff by reason of the infringement found to have been committed by this plaintiff of said reissued patent No. 11536. Said Master heard evidence upon said subject and made findings of fact and conclusions

of law and reported to the Court that said The Computing Scale Company was entitled to receive from this plaintiff $404,101.97 being, as said Master found, the profits made by this plaintiff on the manufacture and sale of said scale theretofore held, as hereinbefore set forth, to be an infringing scale. Thereafter on March 5, 1919, the United States District Court for the Eastern Division of the Northern District of Illinois entered a decree upon said Master's report, giving said The Computing Scale Company a judgment against The Toledo Scale Company, plaintiff herein, in the amount of $420,883.44. Said judgment was affirmed on appeal by said United States Circuit Court of Appeals for the Seventh Circuit in an opinion filed October 4, 1921.

25. In said proceedings before said Master this plaintiff as defendant in said cause, offered evidence of the prior manufacture, sale and use of said light weight cylinder in said computing scale so manufactured by said Phinney, but said Master and the District Court and said United States Circuit Court of Appeals each and all declined to consider said evidence, either as bearing upon the validity of said reissued patent No. 11536 or as affecting the amount recoverable by said The Computing Scale Company. Said Master ruled that he was bound by the opinion of said Circuit Court of Appeals to the effect that the Smith scale under said reissued Patent No. 11536 made upon the first appeal, was the first successful automatic computing scale, and that Smith was the inventor and discoverer of the light weight cylinder for use therein, and the District Court affirmed the Master without opinion; and the Circuit Court of Appeals upon this point in their second opinion said:

> "Respecting the insistence that, on the proofs offered to the Master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1913 petition to reopen the case on the merits, should reverse our precedent decree upholding the validity of the patent and should reverse the District Court's decree of 1914 and 1919 with the direction to dismiss the bill, we say:
>
> "A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudged, our conception of the nature of the merits decree leaves us to reject the demand."

"B. If it be regarded as a petition in the nature of a bill of review appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review on the same grounds inclines us to stay our hands."

This plaintiff as appellant in said proceeding did not present to said Circuit Court of Appeals, either in the record taken before the Master or before said District Court or otherwise, any evidence with respect to the fraudulent suppression of evidence by said The Computing Scale Company for the reason that plaintiff had no knowledge that said The Computing Scale Company had purchased and secreted or destroyed any of said Phinney scales until on or about the 20th day of December, 1921, and long after the second decision of said case by said Circuit Court of Appeals. The plaintiff never has had its day in court to present to any court on its merits the true facts with respect to the manufacture, sale and successful use of computing scales under the Phinney patent embodying a cylinder or indicating drum substantially identical with that described in and covered by said Smith reissued patent No. 11536 and has had no hearing or opportunity to be heard prior to this time in any court with respect to the frauds practiced upon it and upon said District Court for the Eastern Division of the Northern District of Illinois and said United States Circuit Court of Appeals for Seventh Circuit.

26. After the second decision of said Circuit Court of Appeals for the Seventh Circuit had been rendered as aforesaid this plaintiff duly applied to the United States Supreme Court for a writ of certiorari, which application was denied by said court on the 9th day of January, 1922.

27. After the entry of said judgment against plaintiff in said United States District Court for the Eastern Division of the Northern District of Illinois in the sum of $420,883.44, with interest from March 3, 1919, as aforesaid, this plaintiff as defendant in said suit gave its supersedeas bond in favor of said The Computing Scale Company for the purpose of staying execution of said judgment. Said supersedeas bond is in the amount of $450,000.00 and was duly executed by this plaintiff as principal and by the defendant herein, Fidelity & Deposit Company of Maryland, as surety and was duly filed and approved, and is now in full force and effect.

After the second opinion of said United States Circuit Court of Appeals for the Seventh Circuit had been filed as hereinbefore set forth this plaintiff as appellant in said court moved the court for a stay of mandate in said cause, and thereupon said court ordered that this plaintiff as appellant file an additional bond in the sum of $50,000.00, and that the mandate in said cause be stayed until the further order of said court. Thereupon on November 2, 1921, in pursuance of said order this plaintiff as principal and the defendant herein, Fidelity and Deposit Company of Maryland, as surety, duly executed the bond in the sum of $50,000.00, in favor of said The Computing Scale Company, as further security for the payment to said The Computing Scale Company of the amount of said judgment against this plaintiff, together with interest thereon to the date of payment, and said bond was duly filed and approved and is now in full force and effect.

28. By the terms of said bonds for $450,000.00 and $50,000.00 respectively, the defendant herein, Fidelity & Deposit Company of Maryland, is unconditionally obligated to pay to the defendant herein, the Computing Scale Company, the amount of the judgment obtained by said The Computing Scale Company against this plaintiff in said suit in said District Court for the Eastern Division of the Northern District of Illinois as soon as the mandate from said United States Circuit Court of Appeals to said District Court affirming the judgment of said District Court shall be issued and said mandate will now be issued at once or in the very immediate future and said defendant, Fidelity & Deposit Company will thereupon be called upon to and will if not restrained by this court, pay to said The Computing Scale Company the amount of said judgment and interest fraudulently obtained by said The Computing Scale Company against this plaintiff as hereinafter set forth.

29. In order to obtain the execution of said bond for $450,000.00 by said Fidelity & Deposit Company as surety, it was necessary for this plaintiff to execute its checks, have same duly certified and deliver same to said Fidelity & Deposit Company for the sum of $455,000.00. Said checks were drawn upon and certified by the defendant, The First National Bank of Toledo, Ohio, for $50,000.00; the defendant the Second National Bank of Toledo, Ohio, for $75,000.00; the defendant Northern National Bank of Toledo, Ohio, for $55,000.00; the National Bank of Com-

merce the predecessor of the defendant The Commerce-Guardian Trust and Savings Bank, for $75,000.00; and The Guardian Savings Bank and Trust Company, Cleveland, Ohio, for $200,000.00. Said defendant Fidelity & Deposit Company deposited said certified checks to its account in said banks upon which they were drawn respectively and received from said banks unconditional certificates of deposits payable on demand in favor of said defendant, Fidelity & Deposit Company, and now holds, as security loss by reason of its liability on said bond for $450,000.00, unconditional certificates of deposits payable to its order on demand as aforesaid issued by the defendant First National Bank of Toledo, Ohio, for $50,000.00; by the defendant Second National Bank of Toledo, Ohio, for $75,000.00; by the defendant Northern National Bank of Toledo, Ohio, for $55,000.00; by the defendant, The Commerce Guardian Trust and Savings Bank for $75,000.00; and the defendant, The Guardian Trust and Savings Bank of Cleveland, Ohio, for $200,000.00.

30. Since said certificates of deposit were issued and delivered to Fidelity & Deposit Company of Maryland as aforesaid, interest has accumulated thereon amounting in the aggregate to an amount in excess of $25,000.00, and at the time said Fidelity & Deposit Company executed said second bond in the amount of $50,000.00 it was agreed between plaintiff and said company that the interest accrued and to accrue on said certificates of deposit respectively should stand as security for said Fidelity & Deposit Company of Maryland against loss by reason of its execution of said bond.

31. The amount of said judgment against plaintiff hereinbefore mentioned with interest to date is in excess of $490,000.00 and if the defendant The Computing Scale Company is permitted to collect the amount thereof from the defendant, Fidelity & Deposit Company of Maryland, as the surety upon said bonds, said Fidelity & Deposit Company of Maryland would at once be entitled to present for payment each and all of said certificates of deposit and to collect the principal and interest due thereon and apply the same in satisfaction of the amount paid by it in payment of said judgment and said certificates would, in such event, be at once presented to said banks respectively and demand made for the payment thereof forthwith by said defendant, Fidelity & Deposit Company, and in such event said several

banks respectively, if not restrained herein, would be obliged to and would pay to said Fidelity & Deposit Company the amount due on said several certificates of deposit respectively, and plaintiff would be compelled to pay any balance remaining due to said Fidelity & Deposit Company of Maryland, with the ultimate result that this plaintiff would lose an amount in excess of $490,000.00, all by reason of the fraudulent acts and conduct of the defendant The Computing Scale Company in pursuance of said conspiracy as hereinbefore set forth.

32. The loss which would result to plaintiff if said defendant The Computing Scale Company is not enjoined and restrained from enforcing against this plaintiff and its property and against defendant Fidelity & Deposit Company as surety on said bonds, the whole or any part of said judgment will be irreparable, not only by reason of the fact that this plaintiff would have no remedy at law for the recovery thereof, but by reason of the further fact that the payment thereof by this plaintiff would greatly cripple its business operations and curtail its business and would expose plaintiff to grave danger of complete ruin, and the levy of execution upon said judgment on its property would greatly injure its credit. Plaintiff has exhausted every remedy which it has in or in connection with said suit in which said judgment was obtained against it by said The Computing Sacle Company, and has no remedy, except in equity.

33. Plaintiff further says that by reason of the facts hereinbefore related there is imminent and grave danger that said defendant The Computing Scale Company, will take steps to enforce its said judgment against this plaintiff in the immediate future, either by way of levy upon property which this plaintiff has in the Eastern Division of the Northern District of Illinois, aggregating many thousand dollars in value, or by enforcing payment of said bonds by said the Fidelity & Deposit Company of Maryland, and that it is necessary in order to avoid immediate and irreparable injury, loss and damage, which will result to plaintiff before notice can be served and hearing had that a restraining order issue herein without notice, as hereinafter prayed for.

Plaintiff waives answer under oath.

WHEREFORE plaintiff prays that a temporary restraining order may issue herein without notice, enjoining and restraining the defendant The Computing Scale Company, its officers, agents, solicitors, attorneys, and represen-

tatives from enforcing or attempting to enforce, in any manner whatsoever, the judgment entered by the District Court of the United States for the Eastern Division of the Northern District of Ilinois in the cause in said court entitled The Computing Scale Company, Complainant vs. The Toledo Computing Scale Company, defendant, No. 30024 in equity; and enjoining and restraining said The Computing Scale Company from enforcing or attempting in any manner to enforce paymet by said Fidelity & Deposit Company of Maryland upon said bonds in the amount of $450,000.00 and $50,000.00 respectively, executed by plaintiff as principal and Fidelity & Deposit Company of Maryland as surety, and from in any manner asserting any right or claim based upon or under the said judgment or the decrees of the United States Circuit Court of Appeals for the Seventh Circuit affirming the same, and that the defendant Fidelity & Deposit Company of Maryland may be enjoined and restrained from making any payment to said The Computing Scale Company or to any one upon its behalf upon or under said bonds or either of them, and that said defendant Fidelity & Deposit Company may be enjoined and restrained from cashing said certificates of deposit and each of them, and from withdrawing from the defendant banks any of the funds on deposit with them respectively under the certificates of deposit held by said Fidelity & Deposit Company as its security against liability upon said bonds, and that the defendants the Second National Bank of Toledo, the First National Bank of Toledo, the Northern National Bank of Toledo, The Commerce-Guardian Trust and Savings Bank of Toledo, and The Guardian Trust and Savings Bank Company of Cleveland, Ohio, and each and all of them be enjoined and restrained from paying to or on the order of Fidelity & Deposit Company of Maryland any of the certificates of deposit issued by them respectively for certified checks of plaintiff.

Plaintiff further prays that in due course a preliminary injunction may issue herein, having the same scope and effect as the temporary restraining order hereinbefore prayed for and to remain in effect pending the further order of the court herein.

Plaintiff further prays that upon final hearing herein the defendant The Computing Scale Company may be perpetually enjoined and restrained from enforcing or attempting to enforce as against this plaintiff, its successors and as-

signs any liability or claim of any kind, based upon or arising under or growing out of said judgment obtained by said The Computing Scale Company in said suit in the Eastern Division of the Northern District of Illinois, and any decrees of the United States Circuit Court of Appeals, for the Seventh Circuit upon any appeals in said cause either by levy of execution or in any other manner and that said The Computing Scale Company may be perpetually enjoined and restrained from enforcing or attempting to enforce or asserting against this plaintiff and said Fidelity & Deposit Company of Maryland, its successors and assigns, any liability or claim of any kind or character whatsoever, based upon or growing out of said bonds in the amount of $450,000.00 and $50,000.00 respectively, executed by plaintiff as principal and Fidelity & Deposit Company of Maryland, defendant herein, as surety, in favor of said The Computing Scale Company, and that said The Computing Scale Company may be perpetually enjoined and restrained from seeking or claiming any kind of advantage or benefit of whatsoever nature because of or based upon the entry of each, all or any of the judgments, orders or decrees entered in said suit, and in any appeal therein.

Plaintiff further prays that it may be relieved from all liability to said The Computing Scale Company, its successors and assigns, by reason of the said judgment and decree of said United States District Court for the Eastern Division of the Northern District of Illinois, and of the orders and decrees upon any and all appeals therein, that said bonds in the amount of $450,000.00 and $50,000.00 respectively, in favor of said The Computing Scale Company may be found and held to have been obtained by said The Computing Scale Company fraudulently, and that same may be cancelled, and that plaintiff and Fidelity & Deposit Company of Maryland may be relieved from any and all further liability thereon.

Plaintiff further prays that Fidelity & Deposit Company may be ordered and directed to turn over to plaintiff either by way of assignments of said certificates of deposit or otherwise, all moneys on deposit with each of the defendant banks, for which said Fidelity & Deposit Company of Maryland holds certificates of deposit as security against liability on the said bonds or either of them.

Plaintiff has obtained and files herewith, attached hereto, marked Exhibits A to O. Affidavits of sundry per-

sons bearing upon the fraud of said defendant The Computing Scale Company, and makes reference therto, and prays that same may be received in evidence as a part of this bill of complaint upon the hearing of the motions for a temporary restraining order and a preliminary injunction.

Plaintiff further prays for any and all other relief to which it may be entitled.

RATHBUN FULLER,
BROWN, GEDDES, SCHMETTAU AND WILLIAMS,
TRACY, CHAPMAN AND WELLES,
Solicitors for Plaintiff.

RATHBUN FULLER,
F. L. GEDDES,
GEO. D. WELLES,
Of Counsel.

State of Ohio, Lucas County, ss.

Henry Theobald, being first duly sworn upon his oath, says that he is President of the plaintiff the Toledo Scale Company, that he is familiar with the facts stated in the foregoing bill of complaint, and that the facts therein set forth are true, except in so far as same are alleged to be made on information and belief, and as to such facts he is informed and believes that they are true.

HENRY THEOBALD.

Sworn to before me and subscribed in my presence this 9th day of January, 1922.

FRANK E. MILLER,
Notary Public, Lucas County, Ohio.

EXHIBIT A

Affidavit of Parker Davis.

County of Cook, State of Illinois, ss.

Frank Parker Davis, of lawful age, being duly sworn, deposes and says as follows:

I reside at Evanston, Illinois, and am a member of the law firm of Rector, Hibben, Davis and Macauley of Chicago, Illinois. I became familiar with the reissued Smith patent Number 11,536 in connection with an infringement suit brought in March, 1907, by The Computing Scale Company of Dayton, Ohio, against Toledo Computing Scale Company in the United States Circuit Court at Toledo, Ohio. I later had charge of the defense of another suit subsequently brought on the same patent against the same defendant in the United States District Court by the same pary at Chicago. I had participated in preparing for the defense of said first mentioned suit. There had been made what I believed to be a very thorough and exhaustive investigation of the prior art in the Patent Office at Washington and also careful investigation of various reported instances of prior manufacture, use and sale of scales embodying patented inventions. The patent affairs of the defendant company were at that time in the immediate charge of Mr. Allen DeVilbiss, the inventor of the defendant's scales, who was then at the head of its Inventions and Patent Department but is now deceased. I had frequent consultations with Mr. DeVilbiss in reference to the defense of the suits mentioned, and he was instructed to make a thorough investigation of the prior computing scale art for defenses to the patent in suit. He made repeated trips to various parts of the country upon such work and reported the results of them to me. Subsequently after the bringing of the Chicago suit at Chicago and after the death of Mr. DeVilbiss, still further investigations and efforts were made for the purpose of developing defenses to the patent in suit among other things Mr. DeVilbiss' successor with the defendant company, Mr. John Burkholder, was sent by the defendant, under my direction, to New Mexico and California, New York, Erie, Pennsylvania, Dayton, Ohio, and various other places for the purpose of investigating reported instances of prior manufacture and sale of scales embodying the patented inventions. I also caused renewed investigations of the prior art to be made in the Patent Office at Washington and abroad and

among other things had the old model of the Phinney patent Number 106,869 looked up in the Patent Office to ascertain its construction, but found that it was not a full sized working scale but a very small model and that its computing drum appeared to be of a solid block of wood. I had no knowledge at any time of any scales having been manufactured under or in accordance with said Phinney patent by the patentee or anyone else, nor knowledge of anything to suggest or lead me to believe that if any such scales had been constructed, they differed in any way from the drawing of said patent. This was true until the latter part of the year 1912, at which time I was advised by counsel for the Standard Computing Scale Company at Detroit that he had been informed by an agent of that Company located in Rhode Island that there had been some old scales manufactured under the Phinney patnt and that they had very light computing drums whose shells or cylinders were formed of paper. I thereupon went to Rhode Island to investigate the facts on behalf of the defendant and found them to be as reported. I found that William H. Finney, the patentee, had been dead for some ten years but I succeeded in finding his son, Thomas Z. Phinney, a man fifty years or more of age, who had been familiar with his father's invention and patent and with the scales manufactured under them. I also learned from him that about ten years before he and a number of other witnesses familiar with the facts relating to his fathers' old scales, had been examined concerning hem on behalf of the defendant in a suit which he believed to have been pending at Philadelphia, and in which any event the defendant was represented by a Mr. Howson, of Philadelphia, and he exhibited to me a receipt which Mr. Howson had given him ten years before for one of his father's old scales which he had loaned to Mr. Howson for use in said case. Upon investigation I then found that the Computing Scale Company had, more than ten years before, brought suit upon the patents involved in the present case against Federal Scale Company, at Philadelphia, and that Mr. Phinney (the son) and others had been examined as witnesses in said suit at Pawtuckett, Rhode Island, and that the prosecution of said suit had afterward been abandoned. I also learned that the complainant was represented in said suit by Mr. Melville Church, of Washington, D. C., with whom I had been personally acquainted for many years and whom I knew had been regular eastern counsel for the complainant in this case for more than ten years past.

In the suit against the Toledo Computing Scale Company at Toledo above mentioned, the complaint was represented by Mesesrs. Staley and Bowman, of Springfield, Ohio, who to my personal knowledge had been regular western counsel for the complainant for many years, but who had not, sa far as I was aware, participated in the prosecution of the suit against said Toledo Company at Chicago, which suit had been in the hands of Chicago counsel.

I visited a number of places of business in Pawtuckett and Providence, but found no Phinney scale. I know nothing about efforts that had been made by representatives of The Computing Scale Company to gather up all such scales. My present recollection is that the only Phinney scale I saw was one Thomas Z. Phinney had at his residence in Providence and this scale did not contain a paper drum, but a metal drum.

Thomas Parker Davis.

Subscribed and sworn to before me this 6th day of January, 1922.

Robert Dobberman,
Notary Public.

EXHIBIT B

Affidavit of Harry B. Sherwood.

State of Connecticut, County of Fairfield, ss.

Harry B. Sherwood, having been sworn, deposes and says as follows:

I am fifty-three years of age and a resident of Saugatuck, Connecticut. My home was for many years at Saugatuck, where I lived from the time I was an infant until I was upwards of thirty years of age, removing from Saugatuck about the year 1901 when I became connected with a company known as The Columbian Automatic Computing Scale Company at Washington, D. C. I was connected with the manufacture of their scales at Philadelphia and later at Bridgeport, Connecticut. Later I was Vice-President and Secretary of the Kansas City Computing Scale Company, manufacturing computing scales at Kansas City, Missouri, and later was Manager of the Independent Scale Company, manufacturing scales at Asheville, North Carolina. I returned to Saugatuck about two years ago.

I have known Albert U. Smith, and Edmond C. Smith named as inventor and assignee, respectively, in reissued

letters patent of the United States No. 11,536 of April 28, 1896, ever since my boyhood. When I was a small boy Albert U. Smith lived at Saugatuck, Connecticut, and I knew him at that time. Later he removed to Seymour, Connecticut, some thirty or forty miles from Saugatuck, and still later moved back to Saugatuck. Edmond C. Smith was an uncle of Albert U. Smith, and was a manufacturer of shoe and rope machinery with a factory located at Saugatuck. His residenec address is given in the above mentioned patent as Westport, Connecticut, which is practically the same town as Saugatuck. About the year 1886 I went to work for Edmond C. Smith in his shoe and rope machinery factory, and with the exception of part of one year remained continuously in his employ, and in that of his successors in business, for some fifteen years.

In 1894 or 1895 Mr. Edmond C. Smith, who had by that time largely abandoned the manufacture of shoe and rope machinery previously carried on by him, but was a man of means, became interested in a computing scale which his nephew, Albert U. Smith, had gotten up at Seymour, Connecticut, and a few of which had been built and sold or introduced into use at Seymour. Arrangements were made between the two Smiths by which the manufacture of these scales was transferred to Saugatuck, and placed in charge there of A. U. Smith and myself in the old factory of E. C. Smith. The manufacture of the scales was carried on there for several years, first, under the name of E. C. Smith & Co. and then under that of the E. C. Smith Company, after which the business was sold to the Boston Computing Scale Company, and shortly thereafter was sold by that company to the Computing Scale Company of Dayton, Ohio. The Smith scales were all similar to that illustrated and described in the Smith patent heretobefore mentioned, various improvements being added from time to time.

The manufacture of the Smith scales continued to be carried on at the Saugatuck factory after the sale of the business to the Boston Computing Scale Company, and after its further sale by that company to the Dayton Company, and I remained at the Saugatuck factory in the employ of the Dayton Company, until late in the year 1900 or early in the year 1901, at which time I became connected with a company known as the Columbian Automatic Computing Scale Company, which was organized by some gentle-

men at Washington, D. C., to exploit a computing scale gotten up and patented by a man named Christopher. I was placed in charge of the manufacture of the scales, including the establishment of a factory, which was finally located at Philadelphia, and the manufacturing of the scales begun there, but later on transferred to Bridgeport, Connecticut. In addition to the Company above mentioned, which had organiezd for the manufacture of the Christopher scale (and whose name was subsequently changed to that of Automatic Computing Scale Company) there was a selling company organized under the name of the Federal Scale Company, and this company undertook the marketing of the scales. Shortly after the scales were placed upon the market this latter company was sued, in the United States Court at Philadelphia, by the Computing Scale Company, of Dayton, Ohio, for infringement of the Smith reissued patent No. 11,536 heretobefore referred to, and I assisted the company's attorneys in preparing for the defense of the case. I was familiar with the fact that one William H. Phinney, of Pawtucket, Rhode Island, had manufactured some computing scales at an early date, which had light cylinders or drums composed of paper shells and wooden end pieces or heads, consisting of a hib mounted on a rotary shaft, a rim on which the paper shell was secured and spokes connecting the hib and rim. I knew of these Phinney scales because of one of them had been discovered by one of the early salesmen of the Smith Scales, whose name I believe was Wallace, in a store or morket at Pawtucket, Rhode Island, soon after the Smith Scales were placed on the market in 1894 or 1895. This scale had been brought by him to the Smith factory at Saugatuck, where it remained for a number of years, and where I had seen it and examined it. I told the attorneys for the Federal Scale Company about this old Phinney scale, and then sent a man to Rhode Island to make an investigation, with the result that they secured several similar scales of Phinney's manufacture which had long been in use there. These scales were introduced in evidence in this suit and a number of witnesses examined respecting them, after which the suit was abandoned by the Dayton Company. The last I knew of these several Phinneys they were in the possession of Messrs. Howson & Howson, attorneys for the Federal Scale Company, at Philadelphia. They were all similar to the old Phinney Scale which I had seen at Saugatuck, although

differing somewhat in details from it and from each other. The old Phinney Scale which I saw at Saugatuck had a woden case and was substantially identical in appearance with that marked "Phinney Exhibit Scale". It was arranged to rest on a shelf, which was provided with a hole through which the depending rod or bar carrying the hook for the suspension of the scale-pan extended. Others of said Phinney Scales had metal outer casings, and the entire scale was adapted to be suspended from a hook extending from the ceiling or wall. All of them were provided with light drums or cylinders composed of paper shells and wooden end pieces or heads substantially identical with the drum or cylinder of the old Phinney Scale which I examined at Saugatuck. The scales were of various sizes, as I recall them, with drums or cylinders of corresponding sizes, and they all operated in the manner disclosed in the Phinney patent No. 106,869 of August 30, 1870.

The scale of Phinney's manufacture to which I referred above was still at the factory in Saugatuck when I left there in 1901. After the purchase of the Smith patents by the Computing Scale Company of Dayton, Ohio, the officials of the Dayton Company often visited the factory at Saugatuck, where they were freely admitted about the plant.

About November 1912 I was requested by Mr. Pagelsen, attorney for The Standard Company of Detroit, to visit Saugatuck and other places in Connecticut and Rhode Island in an endeavor to locate one of the old Phinney Scales, about which I had told him a short time before. I had been back to Saugatuck on various occasions since leaving the employ of the Smith factory, and remembered that on one such visit I had seen at the Smith factory one of these old Phinney Scales, along with samples of various other computing scales, in the storeroom at the factory. I at first could not leave my business in Kansas City to make the Eastern trip, but a little later my mother, who had been living in Saugatuck, died, and I agreed to endeavor to find an old Phinney Scale for Mr. Pagelsen on the same trip home. While in Saugatuck I visited the Smith factory late in 1912, but the old Phinney scale to which I refer was no longer there. I also inquired about Pawtucket, Rhode Island, and adjacent towns, but was unsuccessful in my efforts to locate an old Phinney scale at that time. The Smith Scales were no longer being manufac-

tured at Saugatuck, and I was informed that the old scales had all been removed when the manufacture of the Smith Scales was transferred to Dayton, Ohio.

(Signed) Harry B. Sherwood.

Sworn to before me this 3th day of December, 1921.

(Signed) Samuel A. Purdy,
Notary Public.

EXHIBIT C

Affidavit.

State of Pennsylvania, County of Philadelphia, ss.

Ralph B. Evans, being duly sworn, deposes and says as follows:

I reside at Wynnewood, Penna., and I am an attorney at law with offices at 1335 Land Title Building, Philadelphia, Penna. During the month of January, 1913, I searched, at the request of Edward Rector of Chicago, Illinois, the docket and files of the United States Circuit Court for the Easern District of Pennsylvania for the history of a suit for infringement of certain letters patent reported to have been filed in the said Court about the year 1901 by The Computing Scale System of Dayton, Ohio, against the Federal Scale Company, of Philadelphia. The files and docket disclosed that such a suit was brought in the said Court as of October Sessions 1901, No. 12, on October 5, 1901, alleging infringement of certain letters patent to the United States, including reissued letters patent No. 11,536, dated April 28, 1896, and original letters patent No. 597,300, dated January 11, 1898, and praying an injunction and an accounting of profits and damages against the defendant. An answer was filed in said suit on or about December 16, 1901, setting up among other defenses, letters patent of United States No. 106,869, granted August 30, 1870, to William H. Phinney, and also alleging a prior invention and use by the said Phinney of scales embodying the inventions of the patents sued upon. A replication thereto was filed, but no proofs were ever filed and at the time of the search in 1913 so far as the records of the Court showed, the cause was abandoned without any prosecution. In December of 1921 I made a further examination of the files and docket of the said Court and found that a decree dismissing the Bill of Complaint was entered of record on February 14, 1913.

The Bill of Complaint was signed by Messrs. Church & Church, of Washington, D. C., as solicitors and counsel for complainant, and the answer by Mr. E. Miller Jackson, of Washington, D. C., and Mr. Charles Howson, of Philadelphia, as solicitors and counsel for the defendant.

Further inquiry at the office of Mr. Charles Howson in Philadelphia about the suit in question revealed that by stipulation between counsel the proofs and exhibits were not filed of record, but were left in the custody of the counsel for the party on whose behalf they were presented. I examined the proofs taken on behalf of defendant in the original. Among them were depositions of William H. Phinney, Elma Owen Phinney, John H. Devlin, Thomas E. Phinney, William H. Gillan, Daniel H. Horton and Myra Phinney, taken before Waldo W. Robinson, 210 Main Street, Pawtucket, Rhode Island, between May 2 and May 10, 1902. The record shows that the complainant was represented at the taking of their depositions by Mr. Melville Church of Washington, D. C., and defendant by Messrs. Howson and Howson of Philadelphia. These depositions show the manufacture and sale of Phinney of certain scales, manufactured under his patent above mentioned, and three of these scales were produced and introduced in evidence. I was informed that subsequent to the taking of these depositions the exhibits were turned over to Mr. Church in whose custody they remained until they were rturnd to Mr. Howson at the latter's request on or about January 10, 1913. After the taking of these depositions the complainant took the deposition of one witness, not, however, bearing upon the defense of the old Phinney scales, but relating to another defense.

Within the past ten days I have examined the same files and docket for the purpose of ascertaining the history of a suit for the infringement of certain letters patent by The Computing Scale Company of Dayton, Ohio, against Richard T. Randall, doing business under the name and styel of R. T. Randall & Co. The suit was brought as of April Term, 1901, No. 63, on August 6, 1901, alleging infringement of certain letters patent to the United States, including reissued letters patent No. 11,536, dated April 28, 1896, and original letters patent No. 597,300, dated January 11, 1898, and original letters patent No. 674,883, dated May 28, 1901, and praying an injunction and an accounting of profits and damages against the defendant. An

answer was filed in said suit October 18, 1901, setting up among other defenses letters patent of United States No. 106,869, granted August 30, 1870, to William H. Phinney, and also alleging a prior invention and use by the said Phinney of scales embodying the inventions of the patents sued upon. A replication was filed November 16, 1901. So far as the records now show the cause was abandoned without any prosecution.

The Bill of Complaint now signed by Messrs. Church & Church, of Washington, D. C., as solicitors and counsel for complainant, and the answer by Mr. John P. Bartlett, of Messrs. Mitchell, Bartlett and Bromwell, of New York City, as solicitor and counsel for defendant.

(Signed) Ralph B. Evans.

The State of Pennsylvania, County of Philadelphia, ss.

Sworn to and subscribed before me this 24th day of December, A. D. 1921.

(Signed) George Swolbert,
Notary Public.

Commission expires Feb. 25, 1925.

EXHIBIT D

Affidavit of Thomas Z. Phinney.

State of New Jersey, County of Essex, ss.

Thomas Z. Phinney, being duly sworn, deposes and says as follows:

I am sixty years old and reside at 90 Rose Terrace, in Newark, New Jersey. My father, William H. Phinney, was the patentee and inventor of the subject matter of Patent No. 106869, dated August 30, 1870, for "Scale for showing weight and price." My father died in August, 1902; about ten years prior to his death he turned over to me a business which he had been conducting for some twenty years, which consisted in the manufacture and sale of computing scales corresponding substantially with the disclosure of the patent aforesaid. The manufacture of these scales was carried on during that period, and for some time subsequent thereto, while I conducted the business, in a shop in the rear of my father's home in Pawtucket, R. I. I had assisted my father in the assembling of the scales during the period of twenty years referred to and I have personal knowledge and a clear recollection of the makeup of the scales assembled in that shop during said period, and also with reference to the exhibition of those scales at vari-

ous places, and the sale of several of them to storekeepers and provision vendors, who regularly used them in weighing and computing the values of the commodities in which they dealt.

I have in my possession the original full-sized scale which my father built and from which the drawings of his said patent were made. This original scale corresponds precisely with the drawings illustrating said patent. It had a wooden casing and contains a pair of drums or cylinders of hollow metal, with paper charts pasted over their cylindrical portions. I recall the model which was sent to the Patent Office—a duplicate of which was for a long time in the possession of my mother and has drums or cylinders of solid wood. This form or drum or cylinder was not followed in any of the scales which my father or I built for sale. The hollow metal form of cylinder was used in but a very few of such scales. In the majority of the scales built by my father and in all of them built by myself we used a form of drum which consisted of making end discs of thin wood cut out in spider form—having an outer rim and central hub connected together by spaced radial spokes. A cylindrical shell of paper without any metallic or wood backing, was glued onto the peripheries of the end discs. This made the drums or cylinders very light. In some of the scales my father used a casing of metal—either brass or iron —but in most of them we used a wooden casing shaped something like the old mantel clocks with two pigeon holes in the front face to hold the account books of the grocers or butchers using the scale. This wood casing was oblong and housed the cylinders as well as the spring of the scale. The pan on which the meat or vegetables were placed hung below the bottom of the wooden casing. The casing rested on two brackets extending from the wall and the pan hung down below them.

The scale marked for identification "Phinney Exhibit Scale" is just such a scale as my father manufactured in considerable numbers during a period of twenty years heretofore referred to, and by myself after I took over the business. This scale is the same one as was referred to by me in a deposition taken February 21st, 1917, and was therein referred to as "Providence Exhibit No. 3". This scale was in use for a great many years in the town of Pawtucket, R. I. It was often tested and sealed by the Sealer of Weights and Measures. On the side of the scale appears a label "Town of Pawtucket, R. I. John H. Potter, Town

Sealer, Sealed January 9, 1880." This particular scale was also referred to in a deposition taken in the suit brought in 1901 against the Federal Scale Company. This scale as well as certain other exhibit scales was turned over to Messrs. Howson & Howson, patent lawyers of Philadelphia, Pa., who informed me that the scales were later sent to Washington, D. C., to the attorney for the Computing Scale Company of Dayton, Ohio, Messrs. Church & Church. In the year 1913, I was requested by Mr. Edward N. Pagelsen, attorney for the Standard Computing Scale Company of Detroit, Mich., to locate a few of the old Phinney scales as well as some of the users of such scales. In company with Mr. Marcus C. Shurtleff, the Standard agent at Providence, R. I., I visited quite a number of the old users of Phinney scales in Providence, Pawtucket, Attleboro, Central Falls and adjacent towns. We learned that practically all of the old scales that had been in actual use had disappeared. Several of the old users informed us that they had been approached some ten years before by a representative of The Computing Scale Company of Dayton, Ohio, who had offered to buy any of the old Phinney scales which they could learn of. Only one scale was found in Mr. Shurtleff's and my search in 1913 that had been in actual use for many years, and this one had been retained only after the owner had refused repeated offers of purchase from the representative of the Dayton Scale Company. The owner of this scale was Mr. Tierney (now deceased) and I have now repurchased the scale from him and have same in my possession.

When we were unable to locate a number of Phinney scaels around Providence and Pawtucket, I remembered the old deposition taken by Howson & Howson in 1901, and wrote to him asking for the return of the exhibit scales then used. Mr. Howson sent me back the exhibit scales after some delay, explaining that they had been in the custody of the counsel for The Computing Scale Company of Dayton, and he had been unable to return them until they had been sent to him from Washington a few days before. The scale referred to in this affidavit "Phinney Exhibit Scale" was one of the scales returned by Messrs. Howson & Howson. I also have a number of the drums or cylinders such as are used in these scales, one of which I note has been marked for identification "Phinney Exhibit Original Drum". My recollection is that this exhibit drum was originally part of the scale which my father sold to one Raymond, a butcher,

who traveled about selling meats from a cart. I recall the use of this scale by said Raymond more than forty years ago, and I recall the circumstances that the scale was broken through some accident and Raymond brought it to my father's shop and procured another. I still have in my possession a number of such complete indicating drums, each composed of skeleton or spider end discs of wood, surrounded by a cylindrical shell of paper. I had a considerable number of parts of scales turned over to me by my father, and from these parts I assembled a number of scales which I sold.

Scales like the scale marked "Phinney Exhibit Scale" were used regularly by Mr. Devlin, Mr. John H. Devlin, his son, Mr. Daniel Horton, Mr. Tierney and Mr. Raymond. There were many others sold and used whose names I do not remember. Mr. Devlin, Sr. had a store on Pleasant Street, Pawtucket, and Mr. Devlin, Jr., a store on River Street, Pawtucket. Mr. Tierney's was on Middle Street and Mr. Horton's store was on Pine Street, and I believe on Main Street for a while. Mr. Raymond lived in Attleboro, Mass.

I have examined a diary kept by my father and find therein notation of sale of a scale to said Horton, October 29, 1878, and an entry referring to installing a scale in Devlin's market August 20, 1873. There are also notations of a scale sent to England, 1873, through one J. Hill, also a notation of a trip to Providence in 1874 to sell scales; also notation of a scale sold to Dexter's Market in Providence on January 1, 1881, and the sale on January 8, 1881, at 223 Cranston Street, Providence, without name of proprietor. I also found in my father's diary notations concerning various exhibitions of the Phinney Scale at business places and fairs and the awarding of a diploma at the New England Fair, December 16, 1873.

I recall advertising circulars which my father distributed and several of which have been preserved, one of the same being attached hereto and markd for idntification "Phinney Exhibit Circular". This has been in my possession for upwards of forty years, and illustrates a form of casing which differs slightly from that of most of the scales which he made and sold. I recall that he preferred the style of casing which the scale "Phinney Exhibit Scale" utilizes.

I recall that all of these scales which were made by my father for exhibition at business places and fairs and for sale were constructed upon identically the same principle as the

scale illustrated in my father's patent, though practically all of them had indicating drums or cylinders composed of skeleton or spider wooden discs and cylindrical shells of paper, the same as "Phinney Exhibit Original Drum" and the drums in "Phinney Exhibit Scale." I recall that my father adopted this construction of drum at an early period and all the drums he turned over to me more than twenty years ago were of this description.

I further recall that the scales which my father sold were regularly sealed, i. e. tested for accuracy and sensitiveness by the Official Sealer of Weights and Measures of the City of Pawtucket, R. I.

I was a boy when my father's business in these scales started, but my familiarity with the enterprise dates back to that time. His shop was on the premises of our home and the various members of the family were in and out of the shop constantly and greatly interested in the work that was going on there. We all assisted my father in such work, and I continued to assist him for many years, traveling about with him frequently when he was exhibiting and endeavoring to sell his scales. During the latter years of his life his hearing became quite poor, and I accompanied him particularly to act as ears for him. In this way I was identified with him in his business almost from the time it started.

From among the parts turned over to me by my father, I assembled three scales, which were sold one at a time to the same individual, whose identity I do not know. Some 24 or 25 years ago he first sought me out and asked me to make him up a scale, representing to me that he was from Connecticut and desired the scale for the uses of the "Grocers and Butchers Association of Connecticut." About a year after that I sold the same individual another scale, upon his solicitation and request. Upon this occasion I recall that I asked him if he hadn't taken the first scale up to Boston and used in connection with the business of the Boston Computing Scale Company. He admitted that he had some connection with that company, but said he was out of it at that time and wanted another scale to use in some other connection. He returned again about a year later and I sold him a third scale. This was the last scale I disposed of to the best of my recollection up to the time in 1902 when I loaned Mr. Howson the scales referred to in my depositions taken at that time. I still hold the receipt

given me by Mr. Howson, dated April 2, 1902, for the scales which I loaned him. These scales were returned to me only after I had written to Mr. Howson for them in 1913, as before stated.

Since 1913 I have made repeated efforts to locate the scales which were put in regular use at places of business where my father sold them, but with the exception of the scale used by Mr. Tierney I have been unable to find any of them. I received the impression from talking with the old users that all of their scales were gathered up many years before in connection with some litigations.

(Signed) Thomas Z. Phinney

Subscribed and sworn to before me this 17th day of December, 1921.

(Signed) Richard Haeberle
Notary Public.

EXHIBIT E

Affidavit of Albert U. Smith.

State of Connecticut, County of Fairfield, ss.

Albert U. Smith, having been sworn, deposes and says as follows:

That he is sixty-two years old and a resident of Saugatuck, Connecticut, where he has been residing for upward of forty years. That about the year 1894 he became interested in computing scales and manufactured, in his own factory at Saugatuck, computing scales of his inventions, which scales he afterwards manufactured for the Computing Scale Company of Dayton, Ohio. He continued manufacturing computing scales for the Dayton Company at his Saugatuck factory until shortly after the death of Mr. O. O. Ozias in 1910. That during the time he was so manufacturing scales for the Dayton Company he was often visited in Saugatuck by the officials and head men of the Dayton Company, he remembering particularly of having been frequently visited by Mr. Ozias, and less frequent visits by Mr. Canby, Mr. James, and Mr. Ludlow. These gentlemen were freely admitted to the Saugatuck factory which at one time employed nineteen men and manufactured about forty scales a day.

In the early days of computing scales — just when he does not remember—he learned of what was known as Phinney Scales, a small cylinder computing scale made up in Pawtucket, Rhode Island. He also does not believe that

very many of these scales were ever made, and does not know where it would be possible to locate one of them to-day unless it is at the factory of the Dayton Scale Company. The reason why he thinks it would be impossible to locate an old Phinney scale in use to-day is that several years ago—while he was still manufacturing scales for the Dayton Company in Saugatuck—the officials of the Dayton Company made a long continued search in an effort to locate some Phinney Scales then in use. As far as he now remembers they succeeded in locating only two Phinney Scales, one of which was in his factory at Saugatuck for many years, and the other of which was sent to the factory at Dayton. Later at the request of the Dayton Company he shipped to them the Phinney Scale in his factory. He does not remember who made the search for the Dayton Company for the Phinney Scales, but believes it was either Mr. Koehne, the patent lawyer at Dayton, or Mr. Stewart, an assistant in the firm of Church & Church, patent lawyers of Washington, D. C. He remembers the search was conducted throughout Providence, Pawtucket and nearby towns in Rhode Island. He does not believe that the Dayton Company now has any Phinney Scales at their factory, for they were sent to the Dayton factory before the time of their fire. He thinks they were probably destroyed in such fire.

(Signed) Albert U. Smith

Subscribed and sworn to before me, this 20th day of December, 1921.

(Signed) Sam'l A. Purdy,
Notary Public.

EXHIBIT F

Affidavit of Marcus C. Shurtleff.

State of Rhode Island, County of Providence, ss.

Marcus C. Shurtleff, being sworn, deposes and says as follows:

I am forty four years of age and reside at 117 Thayer Street, Providence, R. I. I have been a resident of Providence for about twenty years and for the last eleven years have been the Providence representative for the Standard Computing Scale Company.

About November, 1912, I was asked by my Company to make a search for old Phinney Scales, and I accompanied Mr. Thomas Z. Phinney to a number of stores where Phin-

ney scales had been in use. Also we visited many people who had at one time used Phinney Scales, but who were now out of business. We found it impossible to locate more than one old Phinney Scale that had been used in weighting meats and groceries, because the old users informed us that many years before—probably some ten years before—the representatives of the Dayton Scale Company—their name being The Computing Scale Co. of Dayton, Ohio—had made visits throughout this section endeavoring to purchase the old Phinney scales wherever they could find them. The one scale that we found was kept by the old user only after he had repeatedly refused to sell the scale to the representatives of the Dayton Company.

Mr. Phinney later sold me one of the scales which he himself had and in turn transferred it to the Standard Computing Scale Co.

(Signed) Marcus C. Shurtleff.

Subscribed and sworn to before me this 16th day of December 1921.

(Signed) Edw. D. O'Connell
Notary Public.

EXHIBIT G

Affidavit of Edward N. Pagelsen.

State of Michigan, Wayne County, ss.

Edward N. Pagelsen, of lawful age, being duly sworn, deposes and says as follows:

I reside at Detroit, Michigan, am an attorney at law, making a specialty of patent cases, and as such am attorney and counsel for the Standard Computing Scale Company, Ltd., of Detroit, a concern engaged in the manufacture and sale of computing scales. On or about May 15, 1911 said company was sued at Wilwaukee, Wisconsin, where it has an agency, by the Computing Scale Company of Dayton Ohio, for alleged infringement of reissud letters patent number 11,536 and original letters patent number 597,300 covering the inventions of Albert U. Smith in computing scales. I was employed by the Standard Company to defend the suit and continually had charge of it on behalf of the defendant during its entire pendency. I originally filed a plea questioning the jurisdiction of the court upon which plea issue was joined and testimony taken. The question was submitted to his honor Judge Sanborn on briefs and after being held under advisement for a considerable time

the plea was overruled. We thereupon deposited a bond of $25,000.00 in order to avoid the issuance of a preliminary injunction. Thereafter, in July 1912 I filed an answer to the bill in which I set up all of the prior art defenses of which I had been able to learn. About the first of the following November before any proofs had been taken in the case I learned by accident that there was a man at Kansas City, Missouri, who claimed to have knowledge of some very old computing scales having paper drums or cylinders. I went at once to Kansas City and located the man in question who proved to be Mr. H. B. Sherwood, Vice-President of the Kansas City Computing Scale Company. Mr. Sherwood told me that he had formerly lived in Saugatuck, Connecticut and had been in the employ there of the E. C. Smith Company, manufacturers, among other things, of computing scales. He further told me that while so in their employ the E. C. Smith Company had in its possession in a collection of various old computing scales, several computing scales having paper drumb or cylinders which had been manufactured by a man named Phinney somewhere in Rhode Island. Mr. Sherwood further said that he had been back and forth to Saugatuck on various occasions since leaving the employ of the E. C. Smith Company and that on one occasion he had visited their factory and had seen these old Phinney scales stored away along with samples of various other old computing scales in the storeroom in the factory. He thought the scales in question were still there at the time of his conversation with me and that he could readily secure them by going to Saugatuck. Upon my return to Detroit I consulted with my clients and secured their authority to have Mr. Sherwood go to Connecticut at their expense and endeavor to locate and secure the scales in question. I thereupon wired Mr. Sherwood at Kansas City and requested him to go to Saugatuck. He replied that he could not go immediately on account of his business at Kansas City but a few days later wired me again stating that his mother who lived in Saugatuck had just died and that he would go there at once. He returned to Kansas City by way of Detroit and informed me that the E. C. Smith Company had gone out of business and that the old scales had all been removed from the place in their factory where he had last seen them and could not be found.

After this unsuccessful effort to locate the old Phinney scales I had my client instruct its New England agency to have its salesmen, and particularly the one located at

Rhode Island, make a search for any living members of the Phinney family. A week or two later we received word from my client's Rhode Island salesman, Mr. M. C. Shurtliff, stating that he had located a son of Mr. Phinney the patentee of the scales in question who was residing in Providence and had in his possession one of the old scales manufactured by his father, together with parts of others. I at once went to Providence and saw the said Phinney and a number of other people who were familiar with the old scales, including the widow of the patentee Phinney, a woman upwards of eighty years of age, who stated to me that her husband had been dead some ten years; I secured affidavits from a number of persons familiar with the old scales and also procured a sample scale and one of the paper drums or cylinders from another old scale and returned to Detroit. Shortly afterward I reported the information I had secured to counsel representing The Toledo Computing Scale Company for use in the suit which was pending against that company upon the same patents as those upon which my client had been sued. My knowledge and possession of the scales manufactured by Phinney became known to the attorneys of the Computing Scale Company and little if any, objection was made by them to the reduction of the bond from $25,000.00 to $5,000.00 on my motion. Shortly thereafter and after the decision in the case of Computing Scale Company vs. The Toledo Computing Scale Company was affirmed by the Court of Appeals of the Seventh Circuit, the suit against the Standard Computing Scale Company was withdrawn, the plaintiff paying the court costs without any testimony on the merits and without any hearing.

Prior to learning by mere chance of the information which Mr. Sherwood of Kansas City was reported to have respecting some old computing scales having drums or cylinders made of paper, I had no knowledge that any scales of any kind had ever been manufactured under the Phinney patent nor any reason to suppose or believe that if any such scales had been manufactured they had departed in any way from the disclosure of the patent. I had been familiar with the Phinney patent for a number of years in connection with my work for the Standard Computing Scale Company, having been attorney for that company for some four years and having been continuously engaged in its behalf during that period in litigation over computing scale patents. I was fairly familiar with the computing scale art

and particularly with spring drum computing scales but there was nothing about the phinney patent to lead me to suppose or believe that if any computing scales had been manufactured under the patent their computing drums or cylinders had been formed of paper. On the contrary the drawings of the patent indicate that such drum or cylinder was made of some other material such as sheet metal, for the reason that each drum or cylinder was shown in the drawing of the patent as being composed of a single continuous integral sheet of material of uniform thickness formed or shaped up into a drum or cylinder and when I met Mr. Phinney, the son, at Providence, I learned from him that some of the old scales manufactured by his father had in fact been provided with sheet metal drums or cylinders and that he still had one of such old scales in his possession and I was subsequently informed that it was from this old metal cylinder scale that the drawings and application for his father's patent had been prepared.

Edward N.Pagelsen.

Subscribed and sworn to before me this 7th day of January 1922.

Eleanor Gardner,
Notary Public, Wayne County, Michigan.
My commission expires February 18, 1923.

EXHIBIT H

Affidavit of William H. Gillan.

State of Rhode Island, County of Providence.

William H. Gillan, being duly sworn, says as follows:

I am 52 years of age, and a resident of Pawtuckett, R. I., and reside at 145 West Ave., Pawtucket, R. I. I am the proprietor of the meat and provision store located at 78 River street, Pawtucket, R. I. I bought this business from John H. Devlin about twelve years ago. I had worked as an employee of Devlin in said store for about seventeen years, and before that as an employee of John H. Devlin, who was the proprietor of the store. I recall that during the time I was working in that store and fully twenty-five years ago there was regularly employed in the weighting and computing of values of meats and provisions, a scale which was known as Phinney's scale. I used this repeatedly myself and continued to do so up to about ten years ago, when some person whose identity I do not now recall purchased the scale from John H. Devlin. I recall

this incident, however, as connected in some way with litigations and I think the person who bought the scale from Devlin was one of the attorneys who took part in the taking of some testimony about that time. I was one of the witnesses and I remember that besides the scale I had turned over to said attorney there were a number of others in his possession, all of the same make, that is, Phinney scales.

During the time I worked in Devlin's store, and was myself proprietor of that store, I became very familiar with the Phinney scale in use there, both through my frequent use of it and through examination of its interior construction. It corresponded in all essential respects with Phinney's Exhibit Sample Scale, the only difference that I can recall being that it had a wooden casing of somewhat different design, instead of the iron casing of the exhibit scale. It had identically the same arrangement of a horizontal sight opening or slot across the front of the casing, and there were price per lb. numerals marked along this slot on the casing. The casing also bore the name William H. Phinney, and the date of his patent. There was in this scale the same arrangement as in the exhibit scale of a spring in the upper part of the casing, and a bar suspended from the spring and cut with gear teeth, which engages a gear wheel. Furthermore, the construction was identical with that of the exhibit scale with respect to the location of that gear wheel between the drums. The drums and the gear wheel were fastened together as in the exhibit scale, so that when goods were placed upon the pan which hung from the lower end of the bar, the drums would turn within the casing, and weight and value numerals would be exhibited through the slot of the casing. I had occasion more than once to inspect the interior mechanism of the scale so used in Devlin's and later my store, and I recall distinctly that the indicating drums and wooden hubs which were fastened upon a metal rod that was held between bearings on the casing, the same as in the exhibit scale. I further recall that each of these drums was identical in construction with the "Phinney Exhibit Original Drum", in that each was composed of skeleton and disks or heads of wood and a cylindrical shell of paper.

(Signed) William H. Gillan.

Subscribed and sworn to before me at Pawtucket, R. I., this 15th day of December, 1921.

(Signed) Benjamin J. Dyer.
Notary Public.

EXHIBIT I

Affidavit of Joseph McNally.

State of Rhode Island, County of Providence, ss.

Joseph McNally, being duly sownr, deposes and says as follows:

I am fifty-one years of age and reside at 48 West Cole Street, Pawtucket, R. I. I was clerk in the grocery and butcher market of Mr. John H. Arnold at Pawtucket Avenue and Waldo Street, Pawtucket, about thirth-three years ago. I remained in the employ of Mr. Arnold about seventeen months. During that time there were two scales in his store, one a bar platform scale and the otehr a Phinney scale similar to the phinney Exhibit Scale. The scale had a wooden casing resting on two brackets with the pan hanging below the brackets. Mr. Arnold sold the market to Mr. William H. Andrews and about eight or nine months later I bought out the market. The Phinney scale was in the market when I bought it. I used it every day for many years. This scale was inspected by Mr. James Crawford, Sealer of Weights and Measurer at Pawtucket.

I remember that it was about thirty-one years ago, just before Christmas that I bought out the meat market mentioned avobe. I fixed this date in my mind because it was about two years before I was marrier, and I was married twenty-nine years ago.

(Signed) Joseph McNally.

Subscribed and sworn to before me at Pawtucket, R. I. this 16th day of December, 1921.

(Signed) Benjamin J. Dyer,
Notary Public.

EXHIBIT J

Affidavit of John H. Devlin.

State of Rhode Island, County of Providence, ss.

John H. Devlin, being duly sworn, deposes and says as follows:

I am seventy-five years of age and reside at 85 Beechwood Ave., Pawtucket, R. I., and am the son of John Devlin who in 1896 and following years kept a meat market at 18 Pleasant Street, Pawtucket, and who later kept a similar business at 78 River Street, Pawtucket. I was about twenty-four years old when I first began to help my father in his shop on Pleasant Street, and he then had a Phinney

scale similar to the Phinney Exhibit Scale. The scale my father used had a wooden case with two pigeon holes in it to receive account books. The scale stood on two brackets with the pan hanging below the brackets. My father started business at 78 River Street in 1885, but the scale was in use for several years ahead of that. I, myself, used that scale for ten years, finding it very convenient for weighing meat, vegetables, etc., because it gave the pounds and ounces and also the prices. It was very accurate. That scale was inspected by the Sealer of Weights and Measures. of Pawtucket, R. I., every year, sometimes twice a year.

I, myself, purchased a scale from Mr. Phinney later, when I succeeded my father in business at 18 Pleasant Street. At one time I had two Phinney scales in use. The second scale was identical with the first. I used this scale for a great many years, something like twenty-five or twenty-six years. I found it very accurate, and it gave accurate weight and price. The name of the Sealer oat Pawtucket was Mr. James Crawford. I also knew Mr. John H. Potter, who was Town Sealer before Mr. Crawford. Mr. Crawford inspected the second scale I mentioned above and sealed it. When I closed my business at 78 River Street, I sold out to my nephew, Mr. William H. Gillan, who had been working for me at that store for sixteen or seventeen years.

I saw advertisements put out by Mr. Phinney promoting the sale of his scales.

(Signed) John H. Devlin (Seal)

Subscribed and sworn to before me at Pawtucket, R. I., this 19th day of December, 1921.

Benjamin J. Dyer,
Notary Public.

EXHIBIT K

Affidavit of Daniel C. Fallon.

State of Rhode Island, County of Providence, ss.

Daniel C. Fallon, being duly sworn deposes and says as follows:

I am sixty-six years of age and residt at 34 Potter Street, Pawtucket, R. I. I am now in the coal business and have been since 1889. Before that I was in the meat business for four or five years, being in partnership with Mr. McDuff on Pleasant Street, Pawtucket. We had three scales in our store, one of them a Phinney scale similar to the Phinney Exhibit Scale. It had a wooden case resting

on two brackets with a pan hanging below the casing. We kept that scale over the meat counter and used it particularly for weighing corned beef. I used it myself every day during the several years we ran the business. The Sealer of Weights and Measures used to come around about once a year and inspect the scale, putting test weights on it and then sealing it, that is, putting his seal on it. He never missed a year.

I purchased the scale with the store business from Mr. Frank Mitchell. I do not remember the exact year we took over this business. We ran the store, however, for four or five years, and sold out in 1888 to Mr. Adolphus Davis. I can fix this year because I was married then, and remember that I sold out in the same year. The next year I went in the coal business, and I have looked up to verify when it was I started in the coal business. It was in the year 1889.

(Signed) Daniel C. Fallon.

Subscribed and sworn to before me at Pawtucket, R. I., this 16th day of December, 1921.

(Signed) Charles E. Conley,
Notary Public.

EXHIBIT L

Affidavit of E. Willard Horton.

State of Rhode Island, County of Providence, ss.

E. Willard oHrton, being duly sworn, deposes and says as follows:

52 Exchange St.

I am sixty-one years old, and reside at 12 Manchester Street, City of Pawtucket, County of Providence, and State of Rhode Island. I was a neighbor and very friendly with Thomas Z. Phinney, son of William H. Phinney, of said Pawtucket, and was constantly running back and forth from my home to Mr. Phinney's shop where he formerly made the Phinney self-reckoning scale, so-called in U. S. patent No. 106.869 issued August 30, 1870. I was very much interested in watching the making of these scales so that I remember distrinctly how they were made. I remember that some of the first had wooden casings, but that the rest had an iron casing. The drums on which the figures which gave the weight and the amount of purchase were printed, were made of wood and metal ends having holes through them and the paper tube with the figures was pasted on these

wooden ends. The drum was mounted to revolve in the casing.

I distinctly remember of diplomas being awarded to Mr. Phinney at different fairs where he had exhibited his self-reckoning scales. I also recollect him selling scales constructed as above set forth to Daniel Horton of Pawtucket, R. I., and that the scale was in constant use for a long time in Horton's store at Pine Street. Mr. Horton died a few months ago. I know that Mr. Phinney also sold one of these scales to John H. Devlin on River Street, Providence, R. I., who also used this scale in his market.

(Signed) E. Willard Horton.

Subscribed and sworn to before me at Pawtucket, R. I., this 15th day of December, 1921.

(Signed) Benjamin J. Dyer,
Notary Public.

EXHIBIT M

Affidavit of Charles H. Tierney.

State of Rhode Island, County of Providence, ss.

Charles H. Tierney, being duly sworn, deposes and says the following:

I am forty-nine years of age and live at 65 Park Street, Pawtucket, R. I. My father, Mr. Patrick Tierney, is now dead, but for many years kept a meat market at 310 Middle Street, Pawtucket. My father started his meat business over thirty years ago, and I helped him in the market from the time that I was old enough to be of service. He and I used a Phinney scale in the shop on Middle Street, and also in the meat market on Central Street, Central Falls, R. I. He also ran a meat cart at one time. The scale we used was similar to the Phinney Exhibit Scale, having a wooden casing with two pigeon holes for the reception of account books and a pan hanging below the casing. I do not remember any particular seal on our scale, but I do remember of the Sealer visiting the store and inspecting the scale.

(Signed) Charles H. Tierney (Seal)

Subscribed and sworn to before me at Pawtucket, R. I. this 16th day of December, 1921.

Benjamin J. Dyer,
Notary Public.

EXHIBIT N

Affidavit of James Shepard.

State of Connecticut, County of Hartford, ss.

James Shepard, being duly sworn, deposes and says as follows:

My name is James Shepard; age 83; years residence, 139 Lake Street, New Britain, Connecticut; occupation, solicitor of patents and expert in causes appertaining to patents. I have been a solicitor of patents since 1866 and have frequently testified as an expert since 1873. Some time in 1901 or 1902, I cannot give the precise date, I was employed by Landers, Frary & Clark as expert in a cause on computing scales brought by The Computing Scale Company of Dayton, Ohio. In connection therewith I requested Mr. Samuel R. Munson, then their superintendent to secure for use in that case a sample of the computing scale as made by one Phinney of Providence, R. I., under an old patent. This resulted in the production of two old computing scales, manufactured by said Phinney, which were first brought to the factory of Landers, Frary & Clark and later sent to Messrs. Mitchell, Bartlett & Brownell, of New York, who were counsel for Landers, Frary & Clark, who made reference in the Answer filed in the cause to the gentlemen having knowledge of the manufacture and sale of the old Phinney scales. As far as I remember no further action was taken in the case by either party, the case being allowed to become abandoned by a lack of prosecution. Mr. George Walker, who was for a long time scale expert for Landers, Frary & Clark was familiar with the Phinney scales which were found for use in this case. The scales were made in substantial accordance with a patent to Phinney, the shell of the indicating drum being made of paper, which material, as I remember is not mentioned in the Phinney patents. The end pieces of the indicating drums were of wood in spider form.

James Shepard.

Subscribed and sworn to before me, a Notary Public, this thirty-first day of December, 1921.

(Seal) Jennie L. Haugh,
Notary Public, Hartford, Conn.

EXHIBIT O

Affidavit of Bert W. King.

State of Michigan, County of Wayne, ss.

Bert W. King, of lawful age, being duly sworn, deposes and says as follows:

I reside at Detroit, Michigan, and am in the employ of the Barnes Scale Company of Detroit, manufacturers of computing scales. I have been in the employ of that company continuously since 1919 and before that was in the employ of the Standard Computing Scale Company, Limited, of Detroit, since June the first, 1919. Prior to that date I was in the employ of the Computing Scale Company of Dayton, Ohio. I have been connected with the manufacture of scales for the past 27 years and during my employment by The Computing Scale Company of Dayton, Ohio, had charge of the final tests of the computing scales manufactured by said company by which their adjustment and accuracy were determined. While I was in the employ of said last mentioned company, at Dayton, Ohio, it had in its possession a number of old computing scales not manufactured by that company, which scales were provided with very light drums or cylinders composed of cylindrical paper shells and wooden end pieces mounted upon a shaft or spindle, the surfaces of the paper cylinders being provided with circumferential rows of figures to indicate the weights of the article placed on the pan of the scale and the value of such article at various prices per pound or ounce. On one occasion about a year before leaving the employ of the Computing Scale Company I was directed by the Superintendent, Mr. Joseph Hopkins, to adjust one of said scales and put it in proper order for securing weighing and price computation, and did so. The scale in question had a cast iron body in which was secured two light drums or cylinders such as those above described, the ends or heads of the drums or cylinders being composed of thin pieces of wood partially cut away to still further lighten them, and having cylindrical paper shells secured to and carried by them. A pinion was fastened upon the shaft or spindle between the two drums and this pinion was engaged by a rack connected at its upper end with a coil spring and having a scale pan suspended from its lower end. After I had successfully adjusted the Phinney scale I was instructed to return the same to the experimental room, then in charge of W. H. Sanderson (now deceased); at the time I adjusted

the particular scale which I have mentioned there were at least three other old scales, apparently identical with it, hanging up in the experimental room of the Computing Scale Company at Dayton. All of these scales were substantially identical in form and appearance with the scales shown in letters patent No. 106,869 of August 30th, 1870, to one N. Phinney, and the one which I adjusted was substantially identical in construction with the scale disclosed in said Phinny patent with the exception of its computing drums or cylinders which latter were constructed in the manner above described. I had no occasion to examine the interior construction of any of the other scales of similar form and appearance which I have stated were in the experimental room of the Dayton Company at the same time, but there was nothing in their form or appearance to indicate that they differed in any way from the particular scale which I adjusted.

In 1913 I examined the computing scale referred to in an affidavit of Thomas Z. Phinney and marked "Phinney Exhibit Sample Scale" and found that said scale was substantially identical in every respect with the old scales which I saw in the experimental room of the Computing Scale at Dayton, Ohio, and one of which I adjusted as above described. I also at that time examined the drum or cylinder referred to in the affidavit of said Phinney and marked "Phinney Exhibit Original Drum" and found that said drum or cylinder was identical with the drums or cylinders of the old scale which I took apart and adjusted at Dayton at the time above mentioned.

Bert W. King.

Subscribed and sworn to before me this 7th day of January, 1922.

Ignatius Wujeczyk,
Notary Public, Wayne County.

EXHIBIT 1

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

AMENDMENT TO BILL OF COMPLAINT

Now comes the Toledo Scale Company, plaintiff in the above entitled action and files this its amendment to the bill of complaint heretofore filed herein, and makes the United States Fidelity & Guaranty Company a party defendant herein, and says:

(1) That said United States Fidelity & Guaranty Company is a corporation organized and existing under and by virtue of the laws of the State of Maryland, and is a citizen and resident of said state.

(2) That in lieu of paragraphs Nos. 27, 28, 29, 31, 32 and 33 of its said bill of complaint it avers:

(27) After the entry of said judgment against plaintiff in said United States District Court for the Eastern Division of the Northern District of Illinois in the sum of $420,883.44, with interest from March 3, 1919, as aforesaid, this plaintiff as defendant in said suit gave its supersedeas bond in favor of said The Computing Scale Company for the purpose of staying execution of said judgment. Said supersedeas bond is in the amount of $450,000.00 and was duly executed by this plaintiff as principal and by the defendants herein, Fidelity & Deposit Company of Maryland and the United States Fidelity and Guaranty Company as sureties, and was duly filed and approved, and is now in full force and effect.

After the second opinion of said United States Circuit Court of Appeals for the Seventh Circuit had been filed

as herein before set forth this plaintiff as appellant in said court moved the court for a stay of mandate in said cause, and thereupon said court ordered that this plaintiff as appellant file an additional bond in the sum of $50,000.00, and that the mandate in said cause be stayed until the further order of said court. Thereupon on November 2, 1921 in pursuance of said order this plaintiff as principal and the defendant herein, Fidelity & Deposit Company of Maryland as surety, duly executed the bond in the sum of $50,000.00 in favor of said The Computing Scale Company, as further security for the payment to said The Computing Scale Company of the amount of said judgment against this plaintiff, together with interest thereon to the date of payment, and said bond was duly filed and approved and is now in full force and effect.

(28) By the terms of said bond for $450,000.00 the defendants herein, Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company are, and by the terms of said bond for $50,000.00 the defendant herein, Fidelity & Deposit Company of Maryland is unconditionally obligated to pay to the defendant herein, The Computing Scale Company, the amount of the judgment obtained by said The Computing Scale Company against this plaintiff in said suit in said District Court for the Eastern Division of the Nothern District of Illinois as soon as the mandate from said United States Circuit Court of Appeals to said District Court affirming the judgment of said District Court shall be issued and said mandate will now be issued at once or in the very immediate future and said defendants, Fidelity & Deposit Company and United States Fidelity & Guaranty Company will thereupon be called upon to and will, if not restrained by this court, pay to said The Computing Scale Company the amount of said judgment and interest fraudulently obtained by said The Computing Scale Company against this plaintiff as hereinbefore set forth.

(29) In order to obtain the execution of said bond for $450,000.00 by said Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, as sureties, it was necessary for this plaintiff to execute its checks, have the same duly certified and deliver same to said Fidelity & Deposit Company for the sum of $455,000.00. Said checks were drawn upon and certified by the defendant, The First National Bank of Toledo, Ohio, for $50,000.00;

the defendant, the Second National Bank of Toledo, Ohio, for $75,000.00; the defendant, Northern National Bank of Toledo, Ohio, for $55,000.00; the National Bank of Commerce, the predecessor of the defendant The Commerce-Guardian Trust and Savings Bank, for $75,000.00; and The Guardian Savings Bank and Trust Company, Cleveland, Ohio, for $200,000.00. Said defendant Fidelity & Deposit Company deposited said certified checks to its account in said banks upon which they were drawn respectively and received from said banks unconditional certificates of deposit payable on demand in favor of said defendant, Fidelity & Deposit Company, and now holds, as security for itself and said defendant United States Fidelity & Guaranty Company against loss by reason of its liability on said bond for $450,000.00, unconditional certificates of deposit payable to its order on demand as aforesaid issued by the defendant First National Bank of Toledo, Ohio, for $50,000.00; by the defendant Second National Bank of Toledo, Ohio, for $75,000.00; by the defendant Northern National Bank of Toledo, Ohio, for $55,000.00; by the defendant The Commerce-Guardian Trust and Savings Bank for $75,000.00; and the defendant The Guardian Trust and Savings Bank Company of Cleveland, Ohio, for $200,000.00.

(31) The amount of said judgment against plaintiff hereinbefore mentioned with interest to date is in excess of $90,000.400 and if the defendant The Computing Scale Company is permitted to collect the amount thereof from the defendants Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, as sureties upon said bonds said Fidelity & Deposit Company of Maryland will at once be entitled to present for payment each and all of said certificates of deposit and to collect the principal and interest due thereon and apply the same in satisfaction of the amount paid by it in payment of said judgment and said certificates would, in such event, be at once presented to said banks respectively and demand made for the payment thereof forthwith by said defendant, Fidelity & Deposit Company, and in such event said several banks respectively, if not restrained herein, would be obliged to and would pay to said Fidelity & Deposit Company the amount due on said several certificates of deposit respectively, and plaintiff would be compelled to pay any balance remaining due to said Fidelity & Deposit Company of Mary-

land, with the ultimate result that this plaintiff would lose an amount in excess of $490,000.00, all by reason of the fraudulent acts and conduct of the defendant The Computing Scale Company in pursuance of said conspiracy as hereinbefore set forth.

(32) The loss which would result to plaintiff if said defendant The Computing Scale Company is not, enjoined and restrained from enforcing against this plaintiff and its property and against said defendants Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, as sureties on said bonds, the whole or any part of said judgment will be irreparable, not only by reason of the fact that this plaintiff would have no remedy at law for the recorvery thereof, but by reason of the further fact that the payment thereof by this plaintiff would greatly cripple its business operations and curtail its business and would expose plaintiff to grave danger of complete ruin, and the levy of execution upon said judgment on its property would greatly injure its credit. Plaintiff has exhausted every remedy which it has or in connection with said suit in which said judgment was obtained against it by said The Computing Scale Company and has no remedy, except in equity.

(33) Plaintiff further says that by reason of the facts hereinbefore related there is imminent and grave danger that said defendant The Computing Scale Company will take steps ot enforce its said judgment against this plaintiff in the immediate future, either by way of levy upon property which this plaintiff has in the Eastern Division of the Northern District of Illinois, aggregating many thousand dollars in value, or by enforcing payment of said bonds by said Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company, and that it is necessary in order to avoid immediate and irreparable injury, loss and damage, which will result to plaintiff before notice can be served and hearing had, that a restraining order issue herein without notice, as hereinafter prayed for.

Plaintiff waives answer under oath.

Wherefore plaintiff prays as in its said bill of complaint, and further prays that a temporary restraining order may issue herein without notice enjoining and restraining said The Computing Scale Company, defendant herein, from enforcing or attempting in any manner to enforce payment by said the United States Fidelity & Guaranty

Company upon said bond in the amount of $450,000.00 executed by plaintiff as principal and Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company as sureties, and that the defendant the United States Fidelity & Guaranty Company may be enjoined and restrained from making any payment to said The Computing Scale Company, or anyone upon its behalf upon or under said bond.

Plaintiff further prays that in due course a preliminary injunction may issue herein, having the same scope and effect as a temporary restraining order hereinbefore prayed for, and to remain in effect pending the further order of the court herein and upon final hearing herein said preliminary injunction may by order of the court be made perpetual.

Rathbu Fuller,
F. L. Geddes,
Geo. D. Welles,
Solicitors for Plaintiff.

Rathbun Fuller.
Brown, Geddes, Schmettau & Williams,
Tracy, Chapman & Welles,
Of Counsel.

State of Ohio, Lucas County, ss.

Henry T. Theobald, being first duly sworn upon his oath, says that he is President of the plaintiff the Toledo Scale Company, that he is familiar with the facts stated in the foregoing amendment to the bill of complaint, and that the facts therein set forth are true.

Henry Theobald.

Sworn to before me and subscribed in my presence this 11th day of January, 1922.

Seavey E. C. Moor.
Notary Public, Lucas County, Ohio.

EXHIBIT 1

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity & Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

SECOND AMENDMENT TO BILL OF COMPLAINT

Now comes the Toledo Scale Company, plaintiff in the above entitled action, and files this its second amendment to the bill of complaint heretofore filed herein, and amends said bill of complaint as follows:

First: Plaintiff makes The Summit Trust Company a party defendant herein. Said defendant, The Summit Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio and is a citizen and resident of said State and of the Western Division of the Northern Judicial District thereof, having its principal office and place of business in the City of Toledo, Lucas County, in said Northern District of said State.

Second: Plaintiff adds to the bill of complaint as filed, immediately before the prayer, a paragraph numbered "34", as follows:

34. Plaintiff further says that in order to give its certified checks drawn upon the defendant banks in the aggregate amount of Four Hundred Fifty-Five Thousand Dollars ($455,000.00), as hereinbefore set forth, it was necessary for plaintiff to, and plaintiff did, borrow sums aggregating said amount of Four Hundred Fifty-five Thousand Dollars ($455,000.00) from said banks, and said sums were borrowed from each bank in the exact amount of the certified check to be drawn upon each bank respectively, to-wit in the following amounts:

Second National Bank of Toledo	$75,000
First National Bank of Toledo	$50,000
Northern National Bank of Toledo	$55,000
National Bank of Commerce (now The Commerce-Guardian Trust and Savings Bank)	$75,000
The Guardian Savings and Trust Company	$200,000

In order to borrow said sums from said banks, it was necessary for plaintiff to, and plaintiff did, enter into an agreement, in which agreement was set forth the fact that in said suit in the Eastern Division of the Northern District of Illinois the Master had found that the plaintiff herein was indebted to the defendant herein, The Computing Scale Company, in the amount of Four Hundred Four Thousand One Hundred One and 97-100 Dollars ($404,101.97), and that a decree was about to be entered in said court for said amount with interest and costs; that plaintiff herein desired to appeal said cause to the United States Circuit Court of Appeals for the Seventh Circuit, and that the Fidelity and Deposit Company of Maryland had agreed to act as surety on the appeal bond to be given by plaintiff, upon condition that it be fully indemnified. Said agreement further sets forth that said Fidelity and Deposit Company of Maryland was to be indemnified by giving it checks which should in the aggregate equal the penal amount of such appeal bond, and that such checks should then be deposit in the banks against which the same were drawn, and that said Fidelity and Deposit Company of Maryland should then receive unconditional certificates of deposit from said banks in the amounts of the several chacks drawn against them respectively, payable unconditionally to Fidelity and Deposit Company of Maryland, upon demand, bearing and interest at the rate of three (3%) per cent per annum; that said Fidelity and Deposit Company should allow the money represented by such certificates of deposit to remain with such banks until said decree is reversed, paid or settled and its liability on said appeal bond released.

It was further set forth in said agreement that the plaintiff, Toledo Scale Company, at the date of said agreement, to-wit, February 21, 1919, had loans outstanding from said defendant Toledo banks aggregating Three Hundred Ninety-Five Thousand Dollars ($395,000.00) and that it must continue such loans either in their then amounts

or in greater or less amounts, said loans held by said Toledo banks then being in the following amounts respectively:

Second National Bank	$150,000
First National Bank	100,000
Northern National Bank	95,000
National Bank of Commerce	50,000

It was further set forth in said agreement that all of said indebtedness, aggregating Three Hundred Ninety-Five Thousand Dollars ($395,000.00), was evidenced by promissory notes of the Toledo Scale Company to said banks respectively, and that the additional amounts to be loaned, aggregating Four Hundred Fifty-Five Thousand Dollars ($455,000.00) should be likewise evidenced by promissory notes, and that all of such notes should be secured by collateral as provided in said agreement. The collateral security provided for in said agreement for said notes was the following:

Bills Receivable (Customers' notes due Scale Company	$650,000
United States Liberty Loan Bonds	48,500
Canadian Victory Loan Bonds	1,500
Stock of the Morris Plan Bank of Toledo (par value)	5,000
Total	$705,000

It was further provided in said agreement that as further collateral security for such loans the Toledo Scale Company would deposit with the Summit Trust Company, which was by said agreement named as the Trustee to hold said collateral as provided in said agreement, Five Thousand Dollars ($5,000.00) par value of United States Liberty Loan Bonds on the first day of each month, or in lieu thereof Five Thousand Dollars ($5,000) in cash, and that as further collateral security for said bonds the Toleod Scale Company would assign, and did thereby assign, to said Trustee all of its interest in and to said certificates of deposit which were to be issued by the several banks to Fidelity and Deposit Company of Maryland, as provided in said agreement, which might be in excess of the sum eventually required to satisfy said decree or any modification or settlement thereof, said excess, if any, to be applied to the reduction of said loans pro rata.

The amount of the indebtedness of plaintiff to said several banks, secured by the collateral provided for in said agreement has varied from time to time, payments being

made thereon as provided in said agreement, and notes being given for additional loans from time to time as provided for therein. At the present time the indebtedness of plaintiff to the defendant banks secured by the collateral provided for in said agreement and otherwise is in excess of the aggregate amount of plaintiff's indebtedness to said banks at the time said agreement was entered into, and the notes evidencing said indebtedness of plaintiff to said several banks will all become due in the near future, the note first maturing being due January 30, 1922, and that last maturing being due April 26, 1922, and the others falling due between said dates. None of said banks is under any agreement by which it is legally obligated to further extent time to plaintiff for the payment of its indebtedness to them respectively; and if said certificates of deposit should be cashed by said Fidtlity and Deposit Company, said banks would be at full liberty and would be entitled to and plaintiff is informed and believes and therefore avers that there is grave danger some or all of them would require plaintiff to make payment of the amount of plaintiff's indebtedness aforesaid, and that should such demand be made, plaintiff would be unable to make such payment except upon submitting to a sale of the collateral security which said The Summit Trust Company holds as Trustee for said banks, as aforesaid, and without otherwise converting assets into cash; and if such action should be taken, said collateral security and other assets of plaintiff would bring at forced sale very much less than their true value and very much less than the accounts and other collateral security held by said The Summit Trust Company for the benefit of said banks would otherwise produce, and thus further great and irreparable loss would be imposed upon plaintiff; all of which can be and will be avoided if the moneys now on deposit with said several banks and against which said certificates of deposit have been issued, as aforesaid, are relieved from the claims of Fidelity and Deposit Company of Maryland, of United States Fidelity and Guaranty Company and of said The Computing Scale Company, and used exclusively as collateral for said loans and applied in payment thereof.

Wherefore, plaintiff prays as in its bill of complaint; and further prays that temporary restraining order will issue, enjoining and restraining the defendant banks and the defendant The Summit Trust Company from selling or otherwise disposing of said collateral which said The Sum-

mit Trust Company as Trustee holds as security for the said loans made by said defendant banks to plaintiff; and that a temporary restraining order may issue enjoining the defendant banks and each of them from selling or otherwise disposing of any other collateral security which they or any of them hold as security for said indebtedness of plaintiff to them respectively, and enjoining and restraining said defendant banks and each of them from taking steps to enforce the collection of said amounts owed by plaintiff to them respectively; and that upon hearing herein a preliminary injunction may issue to the same effect.

Plaintiff further prays that the said moneys on deposit in said defendant banks respectively, for which certificates of deposit have been issued, as hereinbefore set forth, may be relieved from all claim of the defendants, Fidelity and Deposit Company of Maryland, United States Fidelity and Guaranty Company and The Computing Scale Company; and that the defendant banks may be ordered and required to apply the amount so on deposit with each respectively upon the amount of plaintiff's indebtedness to each of said banks, before proceeding to enforce their claims respectively against other collateral security or property of the plaintiff; and that all right, title and interest of the defendants, Fidelity and Deposit Company of Maryland, United States Fidelity and Guaranty Company and The Computing Scale Company in and to said moneys and in and to said certificates of deposit representing the same may be forever barred. That said defendants and each of them may be perpetually enjoined from assertaing any right, title or interest in or to the same or any part thereof.

Rathbun Fuller,
Brown, Geddes, Schmettau & Williams,
Tracy, Chapman & Welles,
Solicitors for Plaintiff.

Rathbun Fuller,
Thos. H. Tracy,
Geo. D. Welles,
Of Counsel.

State of Ohio, Lucas County, ss.

Henry Theobald, being first duly sworn, upon his oath says that he is President of Toledo Scale Company, the plaintiff in the above entitled suit; that he is familiar with

the facts set forth in the foregoing second amendment to the bill of complaint; and that said facts are true.

Henry Theobald.

Sworn to before me and subscribed in my presence, this 19th day of January, 1922.

Ione Schrinel,
Notary Public, Lucas County, Ohio.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

PRAECIPE

To the Clerk:

Please issue subpoena for the defendant The Summit Trust Company, directed to the Marshal of the United States District Court for the Northern District of Ohio, Eastern Division, in accordance with law.

Tracy, Chapman & Welles,
Attorneys for Plaintiff.

EXHIBIT 2

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

MOTION

Now comes the plaintiff and moves the court for the issuance of a temporary restraining order without notice, in accordance with the prayer of its bill of complaint herein; and further moves the court for the issuance of a preliminary injunction upon notice and hearing.

Brown, Geddes, Schmettau & Williams,
Rathbun Fuller,
Tracy, Chapman & Welles,
Solicitors for Plaintiff.

EXHIBIT 3

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

TEMPORARY RESTRAINING ORDER

It having been made to appear to the court from the verified bill that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and hearing had upon its motion for a temporary restraining order, in that execution upon the judgment obtained by The Computing Scale Company, against plaintiff would be enforced, both by the levy of execution upon plaintiff's property and by the enforcement of the supersedeas bonds given by plaintiff and Fidelity and Deposit Company, and that the result thereof would be great and irreparable loss to plaintiff and injury to plaintiff's credit and business, it is ordered that the defendants and each of them be and they are hereby temporarily restrained and enjoined as follows:

The defendant, The Computing Scale Company, is enjoined and restrained from enforcing or attempting to enforce in any manner whatsoever the judgment entered by the District Court of the United States for the Eastern Division of the Northern District of Illinois in the cause before said court entitled, "The Computing Scale Company, Plaintiff, vs. The Toledo Scale Company, Defendant, No. 30024 in Equity"; and from enforcing or attempting in any manner to enforce payment by Fidelity and Deposit Company of Maryland upon the bonds in the amount of Four Hundred Fifty Thousand Dollars ($450,000.00) and Fifty Thousand Dollars ($50,000.00) respectively executed by plaintiff as principal and Fidelity and Deposit Company of Mary-

land as surety, as supersedeas and stay bonds in said suit; and from in any manner asserting any right or claim based upon or under the said judgment or the decree of the United States Circuit Court of Appeals for the Seventh Circuit affirming the same.

The Fidelity and Deposit Company of Maryland is enjoined and restrained from making any payment to the said The Computing Scale Company or to any one on its behalf, upon or under said bonds hereinbefore mentioned, or either of them, and from cashing any and all of the certificates of deposit held by said Fidelity and Deposit Company of Maryland as security against its liability on said bonds, and from withdrawing from the defendant banks any of the funds on deposit with them respectively under said certificates of deposit held by said Fidelity and Deposit Company of Maryland as its security on its liability on said bonds.

The defendant, the Second National Bank of Toledo, First National Bank of Toledo, Northern National Bank of Toledo, The Commerce-Guardian Trust and Savings Bank of Toledo and The Guardian Savings and Trust Company of Cleveland, Ohio, and each of them, is enjoined and restrained from paying to or on the order of Fidelity and Deposit Company of Maryland the principal or interest on or upon any of the certificates of deposit issued by them respectively in favor of said Fidelity and Deposit Company of Maryland for certified checks of plaintiff, the principal amounts of said certificates of deposit being in the following amounts respectively:

First National Bank of Toledo, Ohio,	$50,000
Second National Bank of Toledo, Ohio,	75,000
Northern National Bank of Toledo, Ohio,	55,000
The Commerce-Guardian Trust and Savings Bank of Toledo, Ohio,	75,000
The Guardian Savings and Trust Company of Cleveland, Ohio,	200,000

This order shall remain in full force and effect until and including January 19, 1922; and the motion of plaintiff for the issuance of a preliminary injunction herein is hereby set for hearing on January 19, 1922, at four o'clock P. M.

It is ordered that plaintiff give bond for the issuance of this temporary restraining order in the amount of One Thousand Dollars ($1000.00), to be approved by this

court; and said bond having been filed with the Clerk, same is hereby approved.

John M. Killits,
Judge.

Toledo, Ohio, January 9, 1922.

EXHIBIT NO. 4

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,
Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,
Defendants.

TEMPORARY RESTRAINING ORDER ON AMENDMENT TO BILL OF COMPLAINT

This day came the plaintiff and filed its amendment to its bill of complaint heretofore filed herein, and upon its motion the United States Fidelity & Guaranty Company is hereby made a party defendant herein; and it appearing to the court from the verified amendment and the verified bill that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and hearing had upon its motion for a temporary restraining order against said defendant United States Fidelity & Guaranty Company;

It is ordered that said defendant and the defendant The Computing Scale Company are enjoined and restrained from enforcing or attempting to enforce in any manner the judgment entered by the District Court of the United States for the Eastern Division of the Northern District of Illinois, referred to in the original restraining order heretofore made herein against said defendant the United States Fidelity & Guaranty Company, and said United States Fidelity & Guaranty Company is enjoined and restrained

from making any payment to said defendant The Computing Scale Company or to anyone on its behalf on or on account of the judgment aforesaid.

This order shall remain in full force and effect until and including January 19, 1922, and the motion of plaintiff for the issuance of a preliminary injunction upon the amendment to its petition is hereby set for hearing on January 19, 1922, at 4:00 o'clock P. M.

It appearing that said defendant the United States Fidelity & Guaranty Company as surety executed the bond originally filed herein by The Toledo Scale Company upon the issuance of a temporary restraining order, it is ordered that the plaintiff give new bond for the issuance of said restraining order upon the bill of complaint and the restraining order contained herein in the amount of $1,000.00 to be approved by this court; and said bond having been filed with the court same is hereby approved.

Toledo, Ohio, January 11, 1922.

John M. Killits,
District Judge.

EXHIBIT NO. 5

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

State of Illinois, County of Cook, ss.

Herman C. Singer, being first duly sworn, deposes and says that he is a resident of the City of Chicago in the County of Cook and State of Illinois, and is now and has been for more than twenty years last past engaged in the business of selling automatic computing scales.

Affiant further states that during the summer of 1902 he was employed by the Moneyweight Scale Company, dis-

tributors of the Computing Scale Company of Dayton, Ohio, at Chicago, Illinois, but was sent by his employers, together with some six other salesmen of said Moneyweight Scale Company, to the City of St. Louis, in the State of Missouri, for the express purpose of obstructing the business of the Toledo Computing Scale Company, recently instituted in said last-named city. That during the time the affiant was in St. Louis, he and the other salesmen of the Moneyweight Scale Company were supplied with a sample springless scale which was known to the salesmen and other employes of the Moneyweight Scale Company as the "Toledo knocker" scale and was so designated on the charge slips upon which the scales in the custody of the various salesmen were charged or recorded.

Affiant further states that he was instructed that whenever he learned of the demonstration of a Toledo scale to display the so-called "knocker" scale and to endeavor, by offering it a much lower price than the price of the Toledo scale, to prevent the sale of the Toledo scale. The affiant states that to the best of his knowledge and belief none of the so-called "knocker" scales that were sold at that time at St. Louis were ever delivered to purchasers, and that none of the so-called "knocker" scales that he personally sold were ever delivered.

Affiant further says that afterwards, to-wit during the month of September, 1902, he entered the employ of the Toledo Computing Scale Company, and that soon after entering the employ of the Toledo Computing Scale Company the Dayton Computing Scale Company brought suit against him for alleged infringement of a patent, and that he is informed and believes that said Dayton Computing Scale Company about the same time brought similar suits against the Toledo Computing Scale Company and Harry F. Anderson, now deceased, another of its salesmen, and against certain users of Toledo scales; that none of the said suits were prosecuted, but that the Dayton Computing Scale Company scattered broadcast circulars advertising said suits like the circulars attached to the deposition of Henry Theobald filed in the Circuit Court of the United States in the case of Toledo Computing Scale Company vs. Moneyweight Scale Company, Number 27617, as Complainant's Exhibits "D" and "G"; that the circular marked Complainant's Exhibit "D" in the prior suit, above referred to, contained a cut purporting to illustrate a scale made by the Computing Scale Company and marked "The Genu-

ine" and a cut illustrating a scale made by the Toledo Computing Scale Company and marked "The Imitation", with the statement that the scale alleged to be the imitation was made by "would-be" competitors.

The affiant further says that the scale so designated "The Imitation" had been sold to his knowledge by said Toledo Scale Company and its predecessors for approximately three years prior to the publication of such advertisement while the scale so designated "The Genuine" had not been sold or offered for sale except as a "Toledo knocker", as hereinabove set forth.

(Signed) Herman C. Singer.

Subscribed and sworn to before me this 14th day of January, A. D. 1922.

(Signed) I. O. Mortimer,
Notary Public.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,
Plaintiff,

vs.

The Computing Scale Company, et al,
Defendant.

In Equity No.....

AFFIDAVIT OF GEORGE WALKER

State of New York, County of Kings, ss:

George Walker, being duly sworn, deposes and says as follows:

That he is sixty-two years of age and a resident of Brooklyn, New York, where he is scale expert for the Jacobs Brothers Company, scale manufacturers, at 71 Warren Street, New York City; that he has been in their employ for two years, and before that was scale expert for Landus, Frary & Clark, of New Britain, Conn., having entered their employ in September, 1900. About a year or two after his employment with Landers, Frary & Clark, he remembers that two computing scales manufactured by one Phinney of Pawtucket, Rhode Island, was brought to the factory at New Britain for use in defense in a patent suit then pending in Philadelphia against the Philadelphia agent of Landers, Frary & Clark, Mr. Richard T. Randall. Each of these scales had a case, the base of which was in the

form of a round-topped box, from the middle of which at the top was an upright extension which enclosed a counter-balancing spring. The lower part of the case had mounted therein a horizontal shaft carrying a divided drum, and a pinion between the two sections of the drum. The shaft was actuated by a rack, attached to a draw-bar, properly connected with the counter-balancing spring and in engagement with the said pinion. The drums were made of paper shells and wooden end pieces or heads, the shells having a computing table printed thereon for indicating the amount of a commodity at various prices per pound through suitable openings in the case. The case of one scale was made of metal, and the other was of wood. Both of these scales were, soon after being procured, sent to Messrs. Mitchell, Bartlett & Brownell, patent lawyers, of New York City, where they remained for some time. They were finally returned to the factory and placed in his possession, where they remained until he was moved into a new factory building, at which time an order was given to clear out the old accumulations in his room and scrap them. The wooden case was knocked to pieces and only the journal brackets were saved, while the metal case scale was thrown into the scrap heap. Neither of these scales have been heard of since. He remembers that the Randall case was not prosecuted by The Computing Scale Company, after the Answer was filed setting forth the old Phinney Scales as a defense. He remembers that when he visited George Geer, butcher, in New Britain, Conn., he was informed by Mr. Geer that he had once owned a Phinney scale with a metal case, but that it had been sold by him to a representative of the Dayton Scale Company.

(Signed) George Walker.

Subscribed and sworn to before me, a Notary Public, this 14th day of January, 1922.

(Signed) C. G. Buckman,

No. 5 Commisisoner of Deeds, City of New York, residing in the Borough of Brooklyn. Term expires Jan. 18, 1923.

(Seal)

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity & Deposit Company of Maryland, United States Fidelity & Guaranty Company, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank and The Guardian Savings and Trust Company,

Defendant.

AFFIDAVIT OF ALBERT H. MEADS

State of Ohio, Lucas County, ss.

Albert H. Meads, being first duly sworn, deposes and says that he is an attorney-at-law with offices in the City of Chicago, in the State of Illinois; that he was engaged in the practice of law in said city of Chicago for more than thirty-four years last past.

Affiant further states that he was one of the solicitors for the Toledo Computing Scale Company, defendant in the suit filed in the United States Circuit Court for the Southern District of Ohio, in which The Computing Scale Company of Dayton, Ohio, was plaintiff, in which suit said plaintiff sought to obtain an injunction to restrain the distribution of circulars by the Moneyweight Scale Company, distributing agents of said Computing Scale Company of Dayton, Ohio, and in which suit it was claimed that by the use of the scales manufactured by said Computing Scale Company one dealing in meat might buy meat at nine cents a pound, retail his meat to his trade at the same price and get his money back and a three per cent profit besides; that a preliminary injunction was granted in said suit restraining said Toledo Computing Scale Company from circulating such circulars and that thereafter said cause was appealed to the United States Circuit Court of Appeals, Sixth Judicial Circuit, and such order of preliminary injunction was reversed for the reason that the said Toledo Computing Scale Company had been warranted in its statements as to the dishonesty of the scales manufactured by said Dayton Com-

puting Scale Company, and that said scales were in fact dishonest. That the opinion of said Circuit Court of Appeals was filed on January 20, 1906, and is reported in Volume 142 of the Federal Reporter on Page 919, reference to which is hereby made.

That after the decision by said Court of Appeals proof was taken in said cause by the parties thereto, said cause was tried in the District Court of the United States for the Southern District of Ohio, and that on or about June 30, 1914, said District Court rendered its opinion which was filed in said cause, in which said opinion the said District Court found that "the taint of uncleanness pervades complainant's entire suit", a copy of which opinion is hereto attached and marked Exhibit A.

Affiant further states that after the rendition of said opinion in said Circuit Court of Appeals for the Sixth Circuit and in the year 1907 a bill was filed in the Legislature of the State of Massachusetts entitled "An act to provide for the testing and sealing of weights, measures and balances, having a device for indicating the price as well as the weight of commodities offered for sale." That affiant, together with Henry Theobald, President and Manager of the Toledo Scale Company, visited the City of Boston in said State of Massachusetts to aid in the passage of such act by the General Court of such Commonwealth and that by such proposed act it was provided that a "sealer or deputy sealer shall seal such device when tested and found correct, or shall mark condemned or seize such device if incorrect."

Affiant further states that at the time when said Henry Theobald and this affiant were attempting to further the passage of such proposed act the Moneyweight Scale Compony, distributing agent for the Computing Scale Company of Dayton, Ohio, was present in said City of Boston by its attorneys and agents and also actively opposing the passage of said act which was known as Senate Bill No. 174, and that the representatives of such Moneyweight Scale Company so opposing the passage of such act were O. O. Ozias, director of said company, John M. Zane, counsel for said company, Coolidge B. Hight, counsel for said company, Robert A. Southworth, attorney for such company, Charles F. Morse, director and counsel for such company, and W. F. Rice.

Affiant further states that in and by the laws of said

Commonwealth of Massachusetts it is provided that within thirty days after the prorogation of the General Court every person, corporation or association whose name appears upon the dockets as employees of any legislative counsel or agent shall render to the Secretary of the Commonwealth a complete and detailed statement under oath of all expenses incurred or paid in connection with the employment of legislative counsel or agents, or with promoting or opposing legislation, and that such statements shall be in such form as the Secretary of the Commonwealth may prescribe and shall be open to public inspection. That in pursuance of such statute the said Moneyweight Scale Company did file in the office of the Secretary of State of said Commonwealth a statement of money expended by it in the matter of the opposing of such legislation, and that by such statements it is shown that the said company expended the sum of $3,650.00 in its efforts to defeat such legislation. A copy of the statement made by said Moneyweight Scale Company duly certified by the Secretary of said Commonwealth of Massachusetts being hereto attached and marked Exhibit B.

Affiant further states that after the said Moneyweight Scale Company was unsuccessful in its efforts to defeat such legislation and on or about the 29th day of November, 1907, it filed its bill in the Supreme Judicial Court of Massachusetts to restrain Felix McBride, Sealer of the City of Cambridge, from condeming scales manufactured by The Computing Scale Company, for which such Moneyweight Scale Company was distributor, and which the said McBride held to be dishonest. That this affiant was one of the solicitors for said Felix McBride, Sealer of said City of Cambridge, in said suit and that upon a trial of said cause the bill of complaint of said Moneyweight Scale Company was dismissed for want of equity, and that thereafter the said Moneyweight Scale Company appealed from such decision to the Full Bench of said Supreme Judicial Court of Massachusetts and that such cause was heard by said Full Bench of said Supreme Court, and that upon the hearing of said cause this affiant was one of the attorneys for said Felix McBride and made an argument in said cause upon his behalf, and that afterwards and on or about October 19, 1909, said Full Bench of said Supreme Judicial Court filed its opinion in said cause, a copy of which opinion is hereto attached marked Exhibit C, said opinion being reported in 199 Mass. Rep. Page 503.

That after the rendition of said opinion by said Massachusetts Supreme Court the said Moneyweight Scale Company brought said cause to the Supreme Court of the United States for review alleging that the said act of the Commonwealth of Massachusetts and the act of said Felix McBride as Sealer of said City of Cambridge deprived it, the said Moneyweight Scale Company, of its property without due process of law. That the record was printed in said cause and the said Felix McBride, by Gilbert A. A. Pevey and this affiant prepared his briefs for the hearing in said United States Supreme Court, and this affiant went from his home in the City of Chicago to the City of Washington, D. C., to argue such cause in said United States Supreme Court but the said Moneyweight Scale Company dismissed its appeal in said cause without hearing upon the day when said cause was set for argument.

Affiant further states that while the said suit in the District Court of the United States for the Southern District of Ohio above mentioned was still pending, and in the year 1909 the said Moneyweight Scale Company in its efforts to annoy and harrass the said Toledo Computing Scale Company instituted a suit in the Circuit Court of the United States for the Northern District of Illinois in the Eastern Division against said Toledo Computing Scale Company, in which suit the attorneys for the plaintiff were solicitors for the plaintiff in said suit in said Southern District of Ohio, and in and by said suit so instituted in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, the said Moneyweight Scale Company sought to recover from said Toledo Computing Scale Company the sum of $100,000.00 for damages alleged to have been suffered by said Moneyweight Scale Company by reason of the publication by said Toledo Scale Company and its agents of statements concerning the inaccuracy and dishonesty of the scales manufactured by said Computing Scale Company which were the subject of the litigation in said suit in said Southern District of Ohio

That a declaration was filed by the plaintiff in said suit in the Circuit Court of the United States for the Northern District of Illinois, and pleas filed by the defendant therein, and that the said Toledo Computing Scale Company was put to large expense in the matter of said cause and that although said cause was pending in said Circuit Court of the United States for the Northern District of Illinois for almost ten years the said plaintiff never caused the same to

be set down for trial but the same was dismissed when called for trial on or about April 8, 1919, for want of prosecution on the motion of the defendant.

Affiant further states that in the spring of the year 1913 a bill was introduced in the Legislature of the State of Ohio to amend Section 13106 of the General Code by providing that "whoever uses in the sale of a commodity a computing scale or device indicating the weight and price of such commodity, upon which scale or device the graduations or indications are false, or inaccurately placed, either as to weight or price, shall be fined not more than $50.00."

Affiant further states that The Toledo Computing Scale Company employed this affiant to aid in the passage of such proposed amendment and that this affiant visited the City of Columbus in the State of Ohio at various times with representatives of said Toledo Computing Scale Company and did interview various legislators in said City of Columbus in an endeavor to procure the passage of such amendment. That the passage of such amendment was opposed by the agents of The Computing Scale Company of Dayton, Ohio, and that after such Act had passed the Legislature of said state, the representatives of said The Computing Scale Company of Ohio sought to have the same vetoed, and that this affiant, together with Henry Theobald, President of said Toledo Computing Scale Company, appeared before the Governor of said State in opposition to the efforts of said The Computing Scale Company to cause such act to be so vetoed.

Affiant further states that he was one of the solicitors for the Toledo Scale Company in the matter of the accounting in case No. 30024 in the Northern District Court of Illinois, Eastern Division, wherein the Computing Scale Company was plaintiff and the Toledo Scale Company was defendant, and that he did not learn until January 18, 1922, that said Computing Scale Company had ever purchased from various parties in the State of Rhode Island or elsewhere, various computing scales known as the Phinney scales, and that affiant never had any knowledge or information until January 18, 1922, that any officers, directors, legal counsel or other persons connected with said The Computing Scale Company had knowledge of the manufacture, sale and use of said Phinney scales more than two years prior to the filing of the original application for the Smith cylinder computing scale at the time said cause No. 30024

in the Eastern Division of the Northern District of Illinois was first submitted on its merits in said court, and that he first acquired the knowledge of the purchase of such Phinney scales by said Computing Scale Company and the knowledge that its officers, agents and attorneys knew at the time of the trial on the merits of said cause No. 30024 that such Phinney scales had been in general use for more than two years prior to the application of said Smith patent by reading on January 18, 1922, certain affidavits entitled in the above cause.

Further affiant saith not.

Albert H. Meads.

Sworn to before me and subscribed in my presence this 19th day of January, 1922.

Ione Schrinel,
Notary Public, Lucas County, Ohio.

EXHIBIT A

THE OPINION

District Court of the United States, Southern District of Ohio, Western Division

The Computing Scale Co.,

Complainant

vs.

Toledo Computing Scale Co.,

Defendant.

No. 5963

Hollister, District Judge

(Filed June 30, 1914.)

A motion for a preliminary injunction having been granted the complainant by Judge Thompson, this case was appealed to the circuit court of appeals. The order of the court below was reversed and the case sent back for trial on the merits.

A consideration of the opinion of that court induces the conclusion that the scope of this court's injury is restrained to narrow limits. In that opinion, after describing the scales and the complainant's circular beginning, "Can You Do This?" and the respondent's circular headed: "A Shameless Admission," Judge Severns says (142 Fed. 919,925):

> "It is only necessary to say that the proof is amply sufficient to show that if the appellee's scales are not deceitful and fraudulent, the conduct of

appellant was such as justly entitled the appellee to the injunction which the court ordered, or other appropriate remedy. If, on the other hand, the character of the appellee's scale and business was of the character charged, the injunction should not have been allowed, and this would be so on a ground quite independent of the merits of the appellant."

This leaves open only the question of the character of the complainant's third variety of scales constructed on the second principle described in the amended and supplemental bill known as number 63 and called "Butchers' Scale." If it is not deceitful and fraudulent, the acts of the respondent are reprehensible indeed; but if it is deceitful and fraudulent, then, of course, the complainant here can have no relief, whatever be the nature of the respondent's conduct. There is, therefore, to be decided here the single question, whether or not the complainant's "Butchers' Scales" is an honest scale. If it is, a perpetual injunction must issue; if it is not, complainant can have no relief in a court of equity. In concluding his opinion, Judge Severns says:

(P. 927: "Alleged inaccuracies in the resignation of whole prices by which they are made greater than they should be, even upon the scheme on which the scale is in fact constructed, are pointed out by counsel for appellant. But these are not so clearly demonstrated by the present record as to justify a definite conclusion.

"We should require the impression which we get of the appellee's scale and the business of making and selling it from its circulars and instruments, to be removed before we could sanction the employment of the process of the court in its protection. As the proof, so far, only serves to deepen it, we must reverse the order granting the injunction, and direct that the cause be proceeded with in due course."

It is admitted by the defendant that the graduations of weight found in the complainant's "Butchers' Scale" are correct; that is to say, that when the scale is used as an ordinary avoirdupois weighing scale, the weight of the commodity, when placed on the platform of the scale, will be accurately shown on the middle of the chart where the graduations of weight are exposed to view—that is to say, accurately shown to the ounce, though not fractions of an ounce, and this is admitted by the respondent to be, in this

respect, a proper scale for a butcher to use, and, in its use in that way, the butcher may, as he does in common practice with ordinary scales, when a fraction of a cent is one-half or greater, take the half cent himself, and when the fraction is less than one-half, give the fraction to the customer.

It is claimed by the complainant that on the chart are printed the ultimate number of cents which represent the value of the article weighed at the money value in cents per pound, with only such departure from absolute accuracy as is involved in transactions in which the ultimate figure shown does not include the one-half cent, and that the dealer can easily tell by the location of the red line on the glass of the slit relative to the figure shown on the chart, to whom the one cent ought to go under the commercial usage. But the respondent claims that the arrangement of figures on the chart is such that in many cases opportunity is given the dealer to obtain not only the half cent which by commercial usage, he would be entitled to, but, in some instances, the other half cent also; and that when a customer calls for a given number of cents worth of a commodity at a fixed price per pound (in which case he is buying by weight and is, of course entitled to an exact weight) the dealer may appropriate to himself the larger part of an ounce, and as shown by some of the demonstrations, even more than an ounce. The opportunity for this is much greater when the figures in the lower row of figures appearing in the slit are read, which method of reading complainant instructed dealers to use.

It was not until after the case was remanded to this court that complainant in its supplemental bill, described a fine line printed upon the magnifying glass over the slit—or the same purpose effected by a fine wire running lengthwise from the middle of the slit immediately behind the glass. The apparent purpose of this was to direct the dealer's attention, not to the lower row of figures on the chart, but to such figures as would appear immediately behind the line or wire.

But it was shown by many demonstrations (a list of which was submitted with the papers but which cannot now be found) that while a reading of the chart, assisted by the wire, would result in greater accuracy than by reading the lower row of figures, still the chart was shown to be inaccurate by the demonstrations made by counsel and by others made in this investigation. It appears that even when the dealer is guided by the figure appearing immedi-

ately behind the line, there may be many transactions in which not only would the dealer appropriate both fractions of a cent, but, in many instances, if the article were purchased by the cents' worth appropriate fractions of an ounce, and even more. Of course, as the machine could be—and in practice was—used both when an article was purchased by weight and when it was purchased by cents' worth, the complainant must be held to have contemplated its use either way.

That a customer may lose as much as even two ounces to which he is entitled, is shown by one of the demonstrations made by counsel for the respondent. If a commodity has the value of 4c per pound and a customer asks for 9c worth, the first figure "9" to appear immediately behind the red line has opposite to it on the weight graduation, 34 ounces. The customer is entitled to 36 ounces. It is true that when two ounces of the commodity are added, making 36 ounces, the red line would indicate the figure "9" in alignment with the figure "4" indicating cents per pound. In other words, unless the dealer knows that in a transaction of this description that the ultimate figure "9" at 4c per pound will indicate on the weight graduation both 34 and 36 ounces, and that a customer is entitled to have the second figure, coming into alignment with the 4c per pound, read, the customer will be short-weighed two ounces.

In as much as the purpose of the red line in most transactions is to fix the figure coming into alignment behind it at the specified price per pound, and since in weighing the article in the illustration given the figure "9" first appearing when the commodity is placed upon the scale is read, it is quite clear that the ordinary dealer would, with absolute honesty, give his customer two ounces less than he was entitled to receive.

An illustration of how the dealer gets more than the half cent which, in any event, he would be entitled to, is shown by a transaction in which 1 lb. and 9 oz. of a commodity is called for which has a fixed value of 25c a pound. When that weight is placed upon the scale the red line falls exactly between the figures 38 and 41 when coming into alignment with the figure indicating 25c per pound. The dealer would calculate 39½c as the value, since that is exactly between 38c and 41c. Under the commercial custom, the dealer would be entitled to charge 40c when in fact 1 pound and 9 ounces at 25c is worth 39.06 cents.

Again, as illustrative of the way in which a purchaser may not get the weight of the article he is asking for, take a transaction in which the purchaser asks for 5c worth of an article, the fixed price of which is 9c per pound. The red line, when the 5 on the chart is brought into sight at the middle of the slit in alignment with the 9c per pound figure below the slit, the weight indicator will show exactly 8 ounces; but a calculation shows that 5c worth of an article at 9c per pound is 8-89 ounces. Hence in such transaction the purchaser would be entitled to 8-9 of an ounce more than he gets. In other words, the purchaser would be entitled to about 1-10 of the article more than he received.

Illustrations might be multiplied indefinitely. A very lucid demonstration is found in Moneyweight Scale Co. v. McBride, 199 Mass. 503, in which Judge Loring shows with great clearness how the dealer gets the fraction of a cent twice when he is asked for a certain weight of an article at a fixed price in cents per pound and also how the customer gets less than the amount in weight to which he is entitled when he asks for so many cents' worth of an article at a fixed price per pound; and he shows in the illustration given by him that the fraction of a cent to which the dealer in the transaction would be entitled is already included within the figure on the chart in alignment with the figure indicating the cents per pound, and for this reason, when the transaction by calculation from the location of the figures gives the dealer the half cent, he gets it twice.

An examination of the chart shows that in the first four columns, corresponding respectively with 4, 5, 6 and 7 cents per pound, the figures come into line in the first column in duplicate; that is to say, two ones, two twos, two threes, two fours, etc.; and in the second column duplicates begin at 3 and are found frequently in that column. In the third column the duplicates begin with twos, and are found frequently. In the fourth column they begin with the elevens and are found with much less frequency. In the fifth column the numbers run in arithmetically correct sequence. In the columns which follow, the numbers drop out in arithmetical sequence occasionally, and when the columns in alignment with the larger numbers per pound, such as 24 and 25 as illustrations, there are sometimes as many as two figures dropped from the chart, and in the last column as many as three.

Experiments with the columns in which there are dupli-

cates of the same figures bring results such as are shown in the illustration by Judge Loring. On the other hand, if an illustration is taken from the sixth column in alignment with 9c per pound and the amount purchased, say is 3 pound and 7 ounces, the line is exactly between the figures 30 and 32; that is to say, 31c. The calculation show that the exact amount of which the dealer is entitled would be 30.93 cents, a fraction which would entitle him to charge 31 cents.

Again, using as an illustration, a call for, say 10c worth of an article at 17c per pound, the customer would be entitled to 9 ounces, the actual value of which would be 9.5625 cents and the dealer would be entitled to 10 cents. And here it will appear that an advantage accrues to the customer because 10c worth at 17c per pound and 10c worth at 18c per pound each show 9 ounces on the weight graduation.

But again, if one pound and nine ounces of an article were wanted at the specified price of 22c, then the line would fall immediately between the figures 33 and 36; that is to say, the dealer would be entitled to charge, on the face of the chart, 35c. But one pound and nine ounces at 22c is worth exactly 34.375 cents, and the customer should not pay over 34c.

So, while no doubt in many instances, whether buying by weight or by cents' worth, the scale does exact justice commercially between the dealer and his customer, yet the chart is so constructed that in a great many instances, the dealer makes more than the one-half cent to which he is entitled commercially when the article is sold by weight and he sells less than the customer is entitled to when he buys the cents' worth.

These demonstrations are sufficient to warrant the court believing the complainant's circular to the effect that a dealer using one of its "Number 63" butchers' scales could sell at cost and make a profit of 3 per cent.

Surely as against the attacks upon this scale the complainant can have no relief, but the complainant says that the attacks of the respondent have been upon all of the complainant's barrel-shaped scales, even though they are confessedly accurate, and claims that an injunction should issue against such attacks set forth in the amended and supplemental bill and proved in the case. The answer to this is that the court of appeals have said that if the complainant's scale was of the character charged, the injunction should not have been allowed, and this on a ground quite independent

of the merits. But aside from this, it may be said that the taint of uncleanness pervades complainant's entire suit and some of respondent's improper attacks on complainant's other barrel-shaped scales are so combined with quite justifiable attacks on complainant's Butchers' Scale No. 63, that it is difficult to separate them. If complainant wishes relief against respondent's attacks on its other barrel-shaped scales, its rights can be shown in another suit brought for the purpose. The respondent may take a decree at complainant's costs.

(Signed) Hollister, District Judge.
Zane, Morse, McKinney and McIlvaine,
Attorneys for Complainant.
Brown, Geddes, Schmettau and Williams,
Albert H. Meads,
Attorneys for Defendant.

EXHIBIT B

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE SECRETARY ARCHIVES
DIVISION BOSTON 9.

January 14, 1922.

I hereby Certify the Attached to be True Copies of the Originals on file in the Archives Division of this Office.
Witness the Great Seal of The Commonwealth.
(Seal)
(Signed) F. W. Cook
Secretary of The Commonwealth.

COMMONWEALTH OF MASSACHUSETTS

(Chapter 3, Revised Laws.)

Section 30. Within thirty days after the prorogation of the general court, every person, corporation or association whose name appears upon the dockets so closed, as employers of any legislative counsel or agent, shall render to the secretary of the commonwealth a complete and detailed statement, under oath, of all expenses incurred or paid in connection with the employment of legislative counsel or agents, or with promoting or opposing legislation. Such statements shall be in such form as the secretary of the commonwealth may prescribe and shall be open to public inspection.

July 24, 1907.

Pursuant to the provisions of chapter 3, Revised Laws, Moneyweight Scale Company, an Illinois Corporation, here-

by returns a complete and detailed statement of all expenses incurred or paid by it in connection with the employment of legislative counsel or agents, or with promoting or opposing legislation by the general court, at its last session, viz :—

To Whom Paid or due (Name of Counsel or Agt.)	Purpose for Which Paid or Incurred (Specify legislation for which entry was made).	Amount
O. O. Ozias	Director of the Company, attended the hearing at State House, but was paid nothing for his services.	
John M. Zane	Counsel; appearance before Committee arguing relative to Senate Bill Number 174.	$450.00
Coolidge & Hight	Counsel; advice and consultation	No charge
R. A. Southworth	Attorney; professional services in reference to Senate Bill Number 174.	$2500.00
Charles F. Morse	Director and Counsel of the Company; trips Chicago to Boston in advisory capacity	$700.00
W. F. Rice	For printed copies of documents placed before members of Legislature.	$20.00

State of Illinois, County of Cook, ss. July 24, 1907.

(Signed) Moneyweight Scale Company by Samuel M. Hastings, Treasurer.

Subscribed and sworn to before me.

(Signed) Bertha Nathanson.
Notary Public.

EXHIBIT C

MONEYWEIGHT SCALE CO

vs.

McBRIDE

Decision of the
Massechusetts Supreme Judicial Court
October 19, 1908
Reprinted from
The Banker & Tradesman
Boston, Mass.

MONEYWEIGHT SCALE CO. vs McBRIDE

(Massechusetts Supreme Judicial Court)
Decided October 19, 1908

Loring, J.—On October 1, 1907, an act of the General Court (St. 1907, c. 535) went into effect entitled "An act to provide for the testing and sealing of weights, measures and balances having a device for indicating the price as well as the weight of commodities offered for sale." By s.1 it is provided that R. L. c. 62, relating to testing and sealing

weights, measures and balances "shall apply to all scales, balances, computing scales and other devices for indicating or registering the price as well as the weight of the commodity offered for sale. All such computing devices shall be tested as to the correctness of both weights and values indicated by them." By s 2 it is provided that "a sealer or deputy sealer shall seal such devices when tested and found correct, or shall mark, condemn or seize such devices if incorrect," in accordance with R. L. c. 62; and all penalties imposed for violations of the provisions of R. L. c. 62, relative weights, measures and balances shall apply to such devices.

On November 29, 1907, this bill in equity was brought by the plaintiff, an Illinois corporation, against the sealer of weights and measures of the city of Cambridge. The bill in substance alleges that it is the sole vendor of weighing and value indicating scales manufactured by the Dayton Company of Ohio, known as barrel-shaped computing scales and manufactured on what is called the secondary principle; that the weights and values indicated by them are correct and accurate; that it has sold large numbers of them in Cambridge, in Massachusetts and in the United States generally, on the conditional sale installment plan; and that money is still due the plaintiff on many of these sales. The bill further alleges that the defendant intends to condemn all secondary principle barrel-shaped computing scales, and seeks to have him enjoined from so doing. The defendant filed an answer which in substance denied that the aforesaid scales were correct and accurate in the values therein set forth. Issue was pointed. The case was heard on the merits, the evidence was taken by a commissioner, a decree was entered dismissing the bill, and the cause is now before us on an appeal from that decree.

The plaintiff and defendant have argued at length the correctness of the kind of computing scales here in question. But the correctness of these scales is not now before us. The decision of that question is committed by the statutes to the sealers of weights and measures of the several cities and towns of the Commonwealth. If a sealer of weights and measures in deciding that question should proceed on erroneous principles of law, his decision could be quashed on certiorari, and in some cases a writ of mandamus might issue directing him to take specific action. See for example Darrigan v. Williams, 198 Mass. 457. But there is

no jurisdiction in this court to take from the public officer selected by the act the duty of deciding the question committed to him for decision by the act, on the ground that he threatens to come to a wrong conclusion. That is what this plaintiff asks the court to do so far as the correctness of the threatened decision by the defendant (as sealer of weights and measures for the city of Cambridge) is concerned.

There is, however, a second ground on which the plaintiff seeks to maintain this bill in equity, namely, that St. 1907, c. 535 is unconstitutional. That question is properly raised by the bill in which the plaintiff seeks to have the defendant enjoined from taking action under it which will affect his rights of property. Board of Liquidation v. McComb, 92 U. S. 531. Such a bill proceeds on the same footing as a bill to enjoin the public officer from doing an act colore offici which is in fact and in law outside his jurisdiction. See for example Owens v. Crossett, 105 Ill. 354; Wetherell v. Newington, 53 Conn. 67; Morgan v. Miller, 59 Ga. 481; Belknap v. Belknap, 2 Johns (Ch.) 463.

In passing upon this second question the arguments put forward on the first question are pertinent although that question is not now directly before us. No better way can be found for demonstrating what the statute has committed to the final decision of the three hundred and fifty-four sealers of weights and measures of the cities and towns of the Commonwealth than to state the arguments which have been made here on the question which those officers have to decide. We speak of the question which has been finally committed by St. 1907, c. 535, to the three hundred and fifty-four sealers of weights and measures because there are thirty-three cities and three hundred and twenty-one towns in the state.

Before taking up the arguments put forward here upon the correctness of these computing scales, it is necessary to understand what they are. As we have said the scales made by the plaintiff are self-computing scales, built on what has been styled the secondary principle. Scale No. 63 was taken at the trial as a type of these scales. The chart indicating the value of the several weights is the thing on which the correctness of this scale depends, so far as it registers the prices.

A facsimile, somewhat reduced in size, of portions of this chart is as follows:

(CHART OMITTED)

The center is duplicated in the portions given because the limits of a single page do not admit of otherwise reproducing a facsimile.

The large figures, 23—0—1, reading down on the left of the center, and 13—12—11, reading upon the right of it, represent the pounds, and the intermediate figures 4, 8, and 12, the ounces which the article put upon the scale weighs. The figures in the several columns in alignment with the one-pound line, for example, represents the value of one-pound at the prices there stated. We assume (although it is not so stated in the evidence) that the first of the two figures 13 means 12½.

This chart is put around a small barrel or drum which contains a set of balances and springs which weigh the article, the weight and value of which are to be stated by the scale in question.

For example, if the article weighs 23 pounds 4 ounces, and is 14 cents a pound, the operator finds the value by looking at the figures in the 14 cent a pound column opposite that weight, and he finds it to be 326 cents.

The drum on which this chart is rolled is under a cover. That cover, on the side of it next to the dealer, has a slit extending across the whole chart, to enable him to read the value as well as the weight of the article put upon the scale. There is also a slit on the customer's side of the drum, which enables him to see the center of the chart, that is, the weight and the weight only. The reason why the figures on the two sides of the center are in inverse order is to enable the same figures to appear on the opposite sides of the chart at one and the same time.

Scale 63, in the words of the plaintiff's principal witness, is intended "for the butcher and the market trade." As will be seen on inspection, it indicates each ounce of the meat or other piece of provision sold, and the value of each two ounces at the several prices for which the chart is drawn up (4, 5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17' 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 cents), when meat or other provisions are sold by weight. The evidence showed that scale 63 and a similar scale numbered 61 are also used, and are intended by the plaintiff to be used to indicate the correct weight when so many cents' worth of meat or other provisions at a specified price are asked for by the customer and sold by the dealer. This evidence also

showed that among the poorer classes this method of dealing is not an infrequent one.

The numbers given in the center column confessedly state with correctness the weight of the article on the scale. As a scale the machine is correct.

The several numbers given in alignment with every two ounces are confessedly commercially correct value where an article is sold by weight. The plaintiff contends that they are correct within the meaning of St. 1907, c. 535. The defendant contends that the values indicated for the odd ounces are in many cases not even commercially correct. What is meant by these two contentions is best shown by an example. Suppose a customer asks for half a pound of cheese at 11 cents a pound. A piece is cut off a cheese and placed upon the scale, and the indicator in the center shows that it weighs 9 ounces. The sum indicator will be exactly half way between two lines, one in alignment with 8 ounces and the other in alignment with 10 ounces. In the case put it will be exactly between the figures 6-7. The price indicated by the chart is half way between 6 and 7 cents, that is to say 6½ cents. The half cent cannot be paid in addition to six cents nor returned if the customer pay 7 cents. Under the commercial custom, which is the plaintiff's sole justification for the figure 6 on the chart now in question and for similar figures placed upon it (as we shall see hereafter more at length), the dealer takes the half cent and charges the customer 7 cents for his cheese.

In point of fact the value of the cheese in the case put is 6 3-16 cents and under the commercial custom the fraction being less than half a cent belonged to the customer, not to the dealer. The amount legally due for the piece of cheese in question is 6 cents.

The reason why the chart (in the case put above) gives 13-16 of a cent to the dealer in place of giving 3-16 of a cent to the customer, is that a fraction of a cent in favor of the dealer is included in the figure 6 opposite 8 ounces. Eight ounces at 11 cents a pound are 5½ cents. The chart gives the dealer the benefit of the half-cent and calls eight ounces 6 cents. Therefore when the dealer taking the mean between 6 cents and 7 cents for 9 ounces finds that the price is 6½ cents, and takes to himself that half cent, he gets a fraction of a cent twice.

The plaintiff's first answer to this is that this is a dishonest use of an honest chart, that it is dishonest to use a commercially correct figure as an arithmetically correct

figure, and that if that be done it is not the chart that is to blame but the dealer who uses it dishonestly.

That argument assumes that the ordinary dealer knows that some of the prices on chart 63 are commercially correct and some arithmetically correct. More than that, that argument assumes that the ordinary dealer knows which of the 4608 prices on chart 63 are commercially and which are arithmetically correct. Still further, that argument assumes that the ordinary dealer in using the chart can and will, in the hurry of business, carry in mind which of the prices are commercially and which are arithmetically correct, and in ascertaining the price not stated in terms on the chart but indicated upon it by the marker coming between two of the prices placed thereon, will bear in mind which prices are commercially and which are arithmetically correct, and take to himself or give to his customer the benefit of the fractions accordingly.

There is nothing on the chart that tells the dealer who buys it that some of the prices are not arithmetically correct. In the absence of such a notice the ordinary dealer would not even necessarily know that any of them are not arithmetically correct. But when the other two assumptions underlying this argument are reached, namely, that some prices on it are only commercially correct and the dealer using it should not only know which are arithmetically and which are commercially correct, but should act upon that in the hurry of business in giving or taking the fractions when fractions are involved in the value of odd ounces, it may be urged that the argument cannot carry the load put upon it and collapses.

The next answer made by the plaintiff's counsel is that the dealer has no right to use the chart to get the value of the odd ounces.

Apart from special directions from the plaintiff, it might well be thought that when the indicator points to an odd ounce on this chart, exactly half way between the even ounces, it indicates that the value of the odd ounce is exactly half way between the values given for the even ounces, and that the defendant is chargeable with knowledge that that is the meaning of the chart in such a case and is chargeable also with knowledge that dealers will so understand and use it.

But this was not the only answer made to this argument of the plaintiff. The other answer made was that the plaintiff has told purchasers of its machines to do the very

thing which it now says ought not to be done, and which, if done, it now says is wrong, and which (it now says) is the wrong of the dealer and not its (the plaintiff's) wrong. There was evidence that on June 14, 1906, the plaintiff sent to its salesmen two stickers to be put "just above the opening so it can be readily seen by the operator of the scale," "wherever you find one of our barrel-shaped scales." The first sticker to be used on scales where an indicator records the weight in the center of the chart is as follows: "To ascertain value, read figures adjacent to the price per pound when indicator is on even ounces; when indicator is on odd ounces or between even ounces take the mean of figures." The second sticker to be used when an indicating line is used in place of the indicator is: "For value, read figures when indicating line is directly over center. When indicating line is between center, take mean figures."

This brings us to the contentions of the plaintiff and of the defendant as to the other use made of computing scales Nos. 63 and 61, namely, where a customer asks price and the scale is used to ascertain what for so many cents' worth at specified weight should be given.

The alleged incorrectness of the chart when used in this way is also most easily shown by an example. Suppose four cents' worth of cheese is asked for at 7 cents a pound. In the seven cents a pound column are two 4's, one opposite 8 ounces and the other opposite 10 ounces. A dealer naturally would or certainly might take the upper of these two 4 cents and deliver to his customer 8 ounces. The customer is entitled to 4-7 of a pound, or a little more than 9 ounces.

It is argued that the incorrectness of this chart when used in this way (to find the weight from the price) comes from the fact that values which are commercially but not arithmetically correct have no place upon such a chart. It is urged still further that they have no place on such a chart for these reasons: Where a customer buying by weight asks for an amount the price of which is not divisible by our currency, the fraction of a cent must be given to the customer or taken to himself by the dealer. But where the amount asked for by the customer is to be measured by its value and the dealer consents to sell on that basis, he is bound to give the customer the exact amount due him at that price if it can be weighed out to him.

In the case put above the customer is entitled to 9 ounces and 1-7 of an ounce. It may be that there is a question as to how this 1-7 of an ounce is to be dealt with in

case of a scale which gives only ounces, for example. How such a fraction should be dealt with in such a case need not be determined here, it is urged. But what is clear as a matter of law (it is also urged) is that the dealer in the case put above does not give the weight due to the customer when he gives the customer 8 in place of 9 ounces. The fraction to be disregarded here (if there be one) is the fraction of the ounce, not the fraction of a cent. And prices which are only commercially (not arithmetically) correct because calculated to give to one or the other those fractions of a cent which result from a sale by weight are not correct when used to sell by the money's worth and not by weight.

The first answer made to this by the plaintiff's counsel was that the chart was designed to give value for weight, and if used to give weight for value is used in a way for which the plaintiff is not responsible.

Here again it is a matter of common experience that in the "butcher and market trade" articles are bought and sold on the basis of so many cent's worth at a specified price. And there was evidence in the case at bar confirming this matter of common experience. In selling such an automatic self-computing scale under these circumstances the plaintiff must be taken to have intended it to be used not only to show the price of a specified weight but the weight at a specified price.

More than that, in making this contention there was evidence that the plaintiff for a second time was not altogether frank. In a circular sent out by the plaintiff to dealers who had bought No. 61 scales, to be distributed by them among their customers, is found this statement: "The use of this machine renders it impossible for you to lose one cent on account of short weight or a mistake in calculation. For example: Should you call for 25 cent's worth of an article, when that article is placed upon the machine it will show its exact value in money." An attempt was made at the trial to confine this circular to scales of another type. But there was evidence that at the head of this circular there was the representation of a scale which is in fact a cut of a No. 61 scale.

We come now to the argument that St. 1907, c. 535, is unconstitutional.

The first contention made by the plaintiff's counsel in this connection is that since by the construction of these scales (taking No. 63 as a type) the scales are not the arbiter of the price but only of the weight, the regulation of

the computing part of such a scale is not within the police power of the state. His argument in support of that contention is: "In ascertaining the value of a given weight at a certain price per pound, there is no common arbiter in the control of either party to which both parties appeal. The sole arbiter is the multiplication table whose dictates are changeless. But the mental process of computation of either purchaser or dealer, the other party to the transaction does not accept. He makes it for himself. Hence any instrument making a computation for the dealer does not enter into the transaction; just as the dealer's table of values would not enter into a sale, so the computed values on the chart of the computing scale do not enter into the transaction over the computing scale. The law has no more right to interfere with the chart of computing values in the scale than it would have to interfere with the table of computed values kept by a merchant."

We have no doubt that it would be within the police powers of a State to forbid the sale of incorrect tables of value to be used by dealers as correct tables in making sales of articles dealt in by them over an ordinary pound and ounce scale. In saying this we mean to put the case where the tables is to be hung upon the dealer's wall and is not to be seen by the customer. By such a table of values not only would an honest dealer be tricked into making dishonest charges, but at least many customers would be cheated. For it is a matter of common experience that many customers accept the computation made by the dealer without verifying its correctness.

We are also of opinion that it is equally within the police power of the State to forbid the sale of such a table when it is made part of an automatic self-computing scale.

Had the Legislature enacted a law forbidding the sale of self-computing scales like the plaintiff's scale No. 63, it would (in our opinion) have been within the police power of the General Court.

But that is not what the Legislature did in enacting St. 1907 c. 535. More than that in St. 1907 c. 535, the Legislature did not enact a statute where authority is given to an administrative officer to forbid the sale of a thing which can be regulated under the police power of the Legislature, in case he deems it to be contrary to law, until the court can determine the legal questions involved, as was the case in New York Life Ins. Co. v. Hardison, 85 N. E. Rep. 410. The act here in question (St. 1907, c. 535),

makes the decision of each one of the three hundred and fifty-four sealers of weights and measures of the Commonwealth final upon the correctness of "computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale." The statute provides that: "All such computing devices shall be tested as to the correctness of both weights and values indicated by them."

If the correctness of the values indicated by such scales and other devices is to be tested by arithmetic, that is to say, if the values are to be arithmetically correct, the acts of the several sealers of weights and measures are of the same character as their acts in determining the correctness of an ordinary pound and ounce scale and the statute is constitutional. The act of a sealer of weights and measures in determining whether a scale balances when nothing is on it and whether it indicates accurately the standard weights when they are placed upon it is an act ministerial in its character. All that the officer is called upon to do in performing this act is to be correct in his observation. Such an act not only may be but must be left to an executive officer. The determination of the correctness of a table of weights and values which it required to be arithmetically correct is of the same character.

But if the correctness to be finally passed upon by a sealer of weights and measures under St. 1907, c. 535 ,is the commercial correctness of the values indicated by such scales or other devices as the correct value for a given weight, that is to say, the sum legally due for a certain weight, and conversely, when articles are sold by the cent's worth, the weight legally due for the value specified, we are of the opinion that the act would be unconstitutional. Such an act would leave to the final determination of a sealer of weights and measures the questions discussed in the arguments made at the bar as to the correctness of the computing scales under consideration here. That is to say, it would leave to an executive officer (first) the determination of the question how great a departure from mathematical accuracy would be permissible in determining the values of small articles sold by weight involving fractions of a cent without making the transactions commercially and therefore legally incorrect, and (second) the question whether a table of values which are only commercially correct because they disregarded fractions of a cent is the proper basis for a table

to be used to find the true weight of articles sold by the cent's worth. Those questions are judicial questions and cannot be left to the final determination of an executive officer.

In addition we are of opinion that the Legislature did not intend to leave to the final determination of three hundred and fifty-four municipal officers the final determination for the territory covered by their several municipalities the puzzling questions upon which the commercial correctness of these computing scales depends. It is enough to point out in that connection that different results might be expected to be reached in this question by such officers.

For these reasons we are of opinion that the General Court, when it enacted St. 1907, c. 535, by which the correctness of self-computing scales and the other devices therein mentioned was committed to the final decision of the sealers of weights and measures for the several cities and towns of the Commonwealth, must (in our opinion) have intended that the values to be placed on such charts should be arithmetically correct. So construed, St. 1907, c. 535, was a valid statute, and the decree dismissing the bill must be affirmed.

So. ordered.

Coolidge & High, John M. Zane and Chas. F. Morse for complainant.

Gilbert A. A. Pevey, city solicitor, and Albert H. Meads (of Chicago, Ill.) for defendant.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al.,

Defendant

In Equity No.....

AFFIDAVIT OF ALBERT U. SMITH

State of Connecticut, ss.
County of Fairchild.

Albert U. Smith, having been sworn, deposes and says as follows:

That he is a resident of Saugatuck, Connecticut, and is the same Albert U. Smith who subscribed to an affidavit

on December 20th, 1921, before Samuel A. Purdy, Notary Public; that since that time he has thought over the statements made in such affidavit and discussed the same with his son-in-law, F. B. Dayton, who had been employed in his scale factory at Saugatuck during the years 1900 to 1912, but that he can think of no incidents to refresh his memory about his early knowledge of the use of Phinney Scales, and cannot definitely remember the name of the merchant from whom the Phinney Scale mentioned as being for some time in his Saugatuck factory was purchased, nor the year in which the search for the outstanding Phinney Scales was made by the representatives of The Computing Scale Company of Dayton; he thinks that he had the Phinney Scale in his small factory in Saugatuck before 1900 and moved it with the other contents of the small factory to his larger factory in another part of Saugatuck; he remembers that Mr. Ozias saw the Phinney Scale in his Saugatuck factory and directed him to send it to Dayton, but he does not believe Mr. Ozias personally helped in the search for the other Phinney Scales, for if he had he believes he would have asked him to accompany him on such search, as they were usually together when Mr. Ozias was in the East; that he was in the employ of The Computing Scale Company of Dayton until the expiration of his patent in September, 1912, and as such was a competitor of, and so hostile to The Toledo Scale Company, that for several years after his employment was terminated he was on very friendly terms with the head man of The Computing Scale Company, and that even to this day his sympathies, as between the two Companies are with the Dayton Company; that he is willing to make this affidavit now only because he will not suppress the truth, and he refuses to make a trip to Toledo to testify in behalf of the Toledo Scale Company.

Albert U. Smith

Subscribed and sworn to before me, a Notary Public, this 14th day of Jan. 1922.

Frederick Bradley

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company ,

Plaintiff,

vs.

The Computing Scale Company, et al

Defendant.

In Equity Number 307

AFFIDAVIT OF JOSEPH McNALLY

State of Rhode Island, County of Providence, ss.

Joseph McNally, being duly sworn deposes and says as follows:

I am a resident of Pawtucket, R. I., and am the same Joseph McNally who gave an affidavit in this case on December 20, 1921. Since making such affidavit I have thought over the question of the final disposition of my old Phinney scale, and recall that several years after I had retired from the meat business I was approached by one Horton, acting as I believe in behalf of The Computing Scale Company of Dayton, Ohio, who requested me to find this scale, and sell it to him. I located the old scale in my cellar and it had a broken casing and we could not locate the pan. I informed him that the scale was useless for weighing purposes but he said that made no difference as they were interested in the scale only from the standpoint of litigation. I have never been called upon by Mr. Horton or the Company that he represented to give any testimony about the scale, nor was I asked to place any identifying marks on the scale at the time of transfer. I thought this rather unusual if the scale was to be used for litigation. I have never seen the scale since. Horton told me at the time of his said purchase that they cared for nothing in the scale but the indicator drums and that it made no difference to them that the other parts were broken or missing.

(Signed) Joseph McNally

Subscribed and sworn to before me at Pawtucket, R. I., this 17th day of January 1922.

(Signed) Benjamin J. Dyer
Notary Public.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al

Defendant.

In Equity No.....

AFFIDAVIT OF THOMAS Z. PHINNEY

City of Washington, District of Columbia, ss.

Thomas Z. Phinney, being duly sworn, deposes and says as follows:

He is of lawful age and is the same Thomas Z. Phinney who gave an affidavit in this case on December 17, 1921. That since that date he has pondered over the subject matter of such affidavit and discussed the same with his wife, He has particularly considered the number of Phinney scales manufactured and sold by either his father or himself, as related in his said affidavit, and also the area through which said Phinney scales were sold and used. As far as he can remember, there were less than twenty Phinney Self-Reckoning scales sold, and they were all sold in the neighborhood of Pawtucket, R. I., He can place in his memory the actual sale and use of twelve of such scales, all of them in Pawtucket, R. I., with the exception of four, one of which was used by Mr. Wiliam Raymond in South Attleboro, Mass.—only one-half mile from the town of Pawtucket—one in Providence—only four miles from Pawtucket—one in Central Falls, R. I.—only one mile from Pawtucket—and the last in Boston and later in England. This last mentioned scale was taken to England with the idea of organizing a Company and putting the Phinney Scale on the market there, his father to receive one-half of the profits made from such scale business in England, but neither his father nor himself has ever heard from the man who took the scale to England. Practically all of the scales sold were sold in Pawtucket, R. I., and all of them were manufactured by his father or himself to Pawtucket.

When in company with Mr. Shurtleff he visited the old Phinney scale users in 1913, he received a definite impression that a continued effort had been made by the representatives of The Computing Scale Company, of Dayton, Ohio, to buy up all of the Phinney scales that had been in use

about Pawtucket and vicinity. He heard several of the old users tell of visits from the Dayton Scale Company's representatives who informed them that their Company stood ready to buy their Phinney scale, or any other Phinney scales that they could locate. He remembers that practically this same report was given him by Mr. Patrick Tierney, of 310 Midlde Street, Pawtucket, Mr. William Raymond, of South Attleboro, Mass., and Mr. Daniel Horton, of Pawtucket. Mr. Raymond, as he remembers, sold a Phinney scale to the Dayton Company's agent and Mr. Horton sold to the Dayton Company not only his old Phinney scale, but also a Phinney scale which he had purchased from Mr. Joseph McNally, of Pawtucket, R. I. Mr. Horton laughingly related to affiant and his father how he had obtained from the Dayton Scale Company's representatives a very high price for one of these Phinney scales—considerably more than the cost of the Phinney scales when they were being manufactured and sold by his father and himself. Mr. Tierney reported that he had been repeatedly approached by the Dayton Company's agent, with offers to purchase his old Phinney scale, and that the agent had gradually raised the price offered until at one time he offered $25 or $30 for the old scale. Mr. Tierney refused to sell—holding on to the old scale for sentimental reasons. He afterwards—in 1913—allowed affiant to have the scale to help him in establishing the manufacture and use of the Phinney scale by his father and himself.

The Phinney scales were never advertised except by hand bills, similar to the one attached, and these hand bills were distributed only in the vicinity of Pawtucket, R. I., or at a Fair in one of the adjoining towns. The last use of the hand bills for advertising purposes was at least thirty years ago.

The affiant did not learn of the suit brought by the Computing Scale Company, of Dayton, Ohio, against the Toledo Scale Company, until December 1912, and then only through Mr. Pagelsen, Attorney for the Standard Computing Scale Company, of Detroit, Michigan. At that time he was requested to secure one or more of the old Phinney scales that had been in actual use and accompanied Mr. Shurtleff, the Standard Company's agent in Providence, on a visit to all of the old Phinney scale users then alive. It was in this search that he first learned that all of the old Phinney scales had disappeared, except the one retained

by Mr. Patrick Tierney. He did not inform the Toledo Scale Company's attorneys of the reports he had heard of the buying up of practically all the old used Phinney scales by the Dayton Company's representatives at this time, because he considered that the location of the Tierney scale, together with the scales and parts of the scales which he had in his own cellar, was sufficient for the purpose for which the Toledo attorneys had requested him to make the search, to-wit: The establishment of the fact that Phinney scales having cylinders with skeleton end pieces of light wood covered with a paper periphery bearing the prices and weights were actually manufactured, sold and used several years before the application was filed by Albert U. Smith, of Asaugatuck, Conn., that resuletd in the patent numbered Reissue No. 11,536.

(Signed) Thomas Z. Phinney.

Subscribed and sworn to before me this 17th day of January, 1922.

Genevieve C. Calvert,
Notary Public.

My commission expires Aug. 1, 1924.

PHINNEY'S PATENT

SELF-RECKONING SPRING SCALE THE ONLY PRACTICAL PRICE-GIVING SCALE ON THE GLOBE

It has been in constant use for a number of years, and for saving of time and labor it leaves all others behind. It is designed for retail dealers in Markets and Groceries, and for Families and Farmers it will displace all others, as a child seven years old can give weight and price of any article as readily and correctly as a grown person. When the price only is required, lay the article in the pan and the price is before you.

There is no fixing and setting—No weights to be handled—No weighing—No reckoning, and no mistakes!

For example: Suppose turkey is selling at 17 cents per pound what is the price of a turkey? Look for 17 on the front of the scale; then lay the turkey in the pan and the price will appear in the slot above the 17.

A Diploma was awarded by the New England Agricultural Society at Boston, in 1873, and also by all other exhibitions wherever entered.

We have testimonials from many who have used them for a number of years.

Wm. H. Phinney,
Pawtucket, R. I.

United States District Court, Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiffs,

vs.

The Computing Scale Company, Fidelity & Deposit Company, of New York, First National Bank, of Toledo, Ohio, Second National Bank, of Toledo, Ohio, Northern National Bank, of Toledo, Ohio, The Commerce-Guardian Trust & Savings Bank, Guardian Savings & Trust Company,

Defendants.

In Equity No. 307

AFFIDAVIT

State of Ohio, County of Lucas, ss.

Charles W. Owen, being first duly sworn, deposes and says as follows:

I reside at Toledo, Ohio, and am a member of the patent law firm of Owen, Owen & Crampton. I have been engaged in the patent practice for more than twenty years and have repeatedly during such period been called upon to compare mechanical structures, to determine similarities in the mechanical details and functions thereof, to consider and pass upon the equivalency of parts, and to consider the patentability of mechanical structures and the validity of patent claims.

I have examined the reissue patent No. 11,536 to A. U. Smith, dated April 28, 1896, and particularily claim 5 and 6 thereof, and the indicator drum structure called for thereby, and understand the same.

I have also carefully examined (1) a scale stamped on its face "Wm. H. Phinney, Pawtucket, R. I., Pat'd. Aug. 30, 1870" and bearing a tag marked "The Computing Scale Co. vs. Toledo Computing Scale Co., Equity No. 30,024. Defendant's Providence Exhibit No. 1"; (2) a

scale stamped on its face "Wm. H. Phinney, Pawtucket, R. I., Pat'd. Aug. 30, 1870" and bearing a tag marked "The Computing Sacle Co. vs. Toledo Computing Scale Co. No. 30,024. Defendant's Providence Exhibit No. 2"; (3) a scale desiganted on its face "Phinney Self Reckoning Scale" and stamped "Pawtucket, R. I., Pat'd Aug. 30, 1870" and bearing a tag marked "The Computing Scale Co. vs. Toledo Computing Scale Co. Equity No. 3,0024. Defendant's Providence Exhibit No. 3", and (4) what purports to be a pair of scale indicator drums and operating rack bearing a tag marked "The Computing Scale Co. vs. Toledo Computing Co. Equity No. 30,024. Defendant's Providence Exhibit No. 4."

I have compared claim 5 of said Smith reissue patent No. 11,536, and the subject matter to which it pertains, with the indicator drums of the said exhibits and it is my unqualified opinion that each of said indicator drums contains every element of said claim, namely, "a spindle provided with a plurality of skeleton frames of light material and secured to said spindle and having secured to their peripheries a sheet of paper forming a cylinder"; that the parts of the indicator drums of the said exhibits are assembled in exactly the same relation and secured together in the same manner as the parts of the indicator drum of the said Smith patent and that if said exhibit scales were in public use prior to the conception of the subject matter of said claim 5, or for more than two years prior to the filing date of the original Smith patent of which said patent No. 11,536 is a reissue, each of said exhibits would constitute a full, complete and unquestionable anticipation of said claim.

I have compared claim 6 of said Smith reissue patent No. 11,536, and the subject matter to which it pertains, with the indicator drum of each of said exhibits and I find, and am of the opinion, that the indicator drum of each of said exhibits includes each and every element of said claim 6 specifically as and in the arrangement call for, namely "a spindle provided with a plurality of skeleton disc or frames of thin aluminum having a sheet of paper extending around and secured to their peripheries to form a cylinder," except that in each of the indicator drums of the exhibits the skeleton discs or frames are not of aluminum but of an equivalent light material to *aluminum*, namely *wood*. I further find from a reading of the specification of said Smith reissue patent, that the stated object of the construction and material used in the Smith indicator drum, as called for in claims

5 and 6 of such patent, was merely to obtain lightness in construction of the indicator drum so as to render it sensitive to weights of small amounts, and that such lightness was obtained by providing the drums with skeleton discs or frames of *thin aluminum* carried by a spindle and having a sheet of paper extending around and secured to their peripheries to form a cylinder.

Aluminum was in existence and well known in 1870, the year stamped on the Phinney exhibit scales, but, with the processes then known the cost of extraction of aluminum from its ores was so high that a pound cost about $20.00 and was therefore prohibitive for commercial use. Since 1876 improved methods of extraction have reduced the cost to considerably less than a dollar a pound and it has since gone into quite extensive use mainly due to its remarkable characteristics of lightness, compared with other metals, its specific gravity being 2.56 or about 1/3 that of iron. Other well known characteristics of aluminum which render it valuable for commercial use are freedom from tarnish, and ease of working.

In view of the characteristics of aluminum, which were well known at the date of conception of the Smith indicator drum covered by his reissue patent 11,536, I am of the opinion that no invention was involved in using aluminum in place of wood, or some other light material, for the skeleton discs or frames of the Smith drum, and that if the said Phinney exhibit scales were in public use prior to the conception of the subject matter of claim 6 of the said Smith patent or for more than two years prior to the filing date of the original Smith patent of which said patent 11,536 is a reissue, each of the exhibit scales or drums is a full, complete and unquestionable anticipation of such claim and that the claim is invalid.

(Signed) Charles W. Owen.

Sworn to before me and subscribed in my presence this 19th day of January, 1922.

(Signed) Estella E. Thomas.
Notary Public, Lucas County, Ohio.

EXHIBIT NO. 6

In the District Court of the United States for the Northern District of Ohio, Western Division.

Transcript Herein, January 19, 1922.

The Toledo Scale Company,

Complainant.

vs.

The Toledo Computing Scale Co., et al.,

Defendants.

In Equity No. 307.

January 19, 1922, 4 o'clock p. m., before Killits, J.

Appearances: Thomas H. Tracy, Esq., Geo. D. Welles, Esq., on behalf of Complainant.

John M. Zane, Esq., E. R. Effler, Esq., Leroy Eastman, Esq., on behalf of Defendant.

The Court:

Gentlemen, I would be glad to have you begin this matter as quickly as possible.

Mr. Welles:

We are ready, if Your Honor please. The matter which is up today is our motion for a preliminary injunction. We desire to offer in evidence, in support of that motion, first, the verified bill of complaint, and then certain affidavits.

The Court:

Do you also offer these amendments to the bill of complaint?

Mr. Welles:

Yes, Your Honor, both of them.

The Court:

Then your affidavits. Will you recite to the reporter, describe to the reporter the affidavits you offer.

Mr. Welles:

We offer the affidavits that are attached to the bill of complaint.

The Court:

They are offered with the bill of complaint?

Mr. Welles:

They are offered with the bill of complaint.

The Court:

Without naming them specifically.

Mr. Welles:

Without naming them specifically. We have same addiitonal affidavits.

The Court:

Has the defense had an opportunity to see the affidavits?

Mr. Welles:

No, Your Honor.

The Court:

Read them to the record, read the names to the record.

Mr. Welles:

Herman C. Singer, George Walker, Albert H. Meads, Albert U. Smith, Joseph McNally, Thomas Z. Phinney, and Charles W. Owen, of Owen & Owen, this city, the patent attorney. Now, does Your Honor care to have me read these affidavits at this time?

The Court:

No. Gentlemen, I think you will appreciate that it is a physical impossibility, and I don't know but what I may say a mental impossibility, for the court to go very far into this hearing today. We will simply be forced to pass it. I presume the defense will want an opportunity, anyhow, to meet these affidavits and answer them.

Mr. Welles:

I should have said, Your Honor, that the affidavits which we have here are only a very small part of the evidence which we desire to present to Your Honor in support of this motion. It will be necessary, in order that the court may be fully placed in possession of the facts, that considerable oral evidence be heard, and if Your Honor can fix some time when several days can be devoted to this matter, we would like to have the oral testimony taken.

The Court:

Mr. Wells, I cannot do that without appointing a master. I cannot do it myself, nor can my associate, Judge Westenhaver, do it. We were endeavoring this afternoon to make some estimate of the time that the pending trial will consume, and I would be highly gratified if we finish it by the first day of March. It will certainly take the most of February. If you are going to ask for oral testimony, I will be forced to appoint a special master.

Mr. Welles:

Well, that is the situation. For a variety of reasons, there is certain evidence which we cannot place before Your Honor properly without the aid of a subpoena, and there are certain witnesses whose testimony we think should be

taken at length, as can be done only by means of oral testimony, either before the court or before a master. And if Your Honor cannot hear it, why then we will have to take a master, of course.

Mr. Zane:

If your honor please, by mandatory statute of the United States, which is a section of the Clayton Act of 1914 it is provided that in a matter of this kind it must take precedence over all other matters except matters of the same description that are older. The statute is mandatory. It is provided by statute, and the equity rule No. 73 of the Supreme Court of the United States. The equity rule is as follows: No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposie party, unless it shall clearly appear from specific facts shown by affidavit or by a verified bill that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice in the contingencies specified the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters except older matters of the same character.

Now, that is rule 73, and the statute, which was passed later, there is embodied in the statute of the United States the words of that rule, in the acts of October 15, 1914.

The Court:

What section is that?

Mr. Zane:

That is Section 18—no, Section 17, Act of October 15, 1914. Has Your Honor it before you?

The Court:

Yes, I have it.

Mr. Zane:

Those are the exact words, that no preliminary injunction shall be issued without notice to the opposite party, and no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restarining

order shall be endorsed with the date and hour of issuance shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time at entry, not to exceed ten days as the court or judge may fix and so on. In case a temporary restraining order shall be granted without notice in the contingencies specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time, and shall take precedence of all matters except older matters of the same character.

Now, I do not understand, Your Honor, that as a matter of right, with a sworn verified bill, and with affidavits filed in support thereof, they have any right to ask Your Honor to take oral testimony. That is not according to the practice. It is outside of the practice. It would be a peculiar and special indulgence to the plaintiff, and courts do not grant it ordinarily, in my experience in the practice, and *we are here ready to answer to this showing that is made by the verified bill and by the affidavits served upon us, and we therefore think that as a matter of right under the statute we are entitled to have the matter proceed.* And it is apparent, since the whole thing here is to try to stop the enforcement of a decree of another United States Circuit Court, confirmed by the Circuit Court of Appeals twice, and then again to the Supreme Court of the United States, where a petition for a writ of certiorari has been denied, following these matters that they rely upon, heard twice by the Circuit Court of Appeals and once presented to the Supreme Court of the United States, and their only idea can be delay, and we think, Your Honor, it is a great injustice to the defendant, The Computing Scale Company of Dayton, to be compelled to wait here and to be put off from day to day a claim of taking oral testimony on an application for a temporary injunction.

Mr. Welles:

Mr. Zane is entirely in error, if Your Honor please, in stating that the matters we desire to present to Your Honor have ever been passed upon by any other court. They have never been passed upon by the Circuit Court of Appeals once, or twice, or at any time. At the time the application for a temporary restraining order was made, enough was stated to Your Honor with reference to the points of

the bill so that Your Honor is now advised that this is a bill which depends upon fraud, proof of fraud, always one of the most difficult things which one can undertake, the evidence of which always lies largely within the breast of one's opponent. Now, it is perfectly manifest that in order to present to Your Honor the true facts with respect to this matter we cannot sit down in our office and draw affidavits to be signed by people who would not even talk to us if we should go to talk to them. You cannot get any information from them on which to base an affidavit. The only way it is possible is for Your Honor to issue the subpoena of this court or to empower, as Your Honor suggests, a master to do so, and to take this testimony.

Mr. Zane, I think, again is in error when he states that we are asking any unusual indulgence of the court in asking the opportunity to present oral evidence. It has been done within my brief experience in these cases in a great many times and in a great variety of cases on an application for a temporary or preliminary injunction. I don't know what the practice may be in Chicago, but I have learned something about it in the last few years here. We realize, of course, the nature of Your Honor's engagements, and it was with reluctance that we decided that we would have to ask for the privilege of putting the evidence in here. The grossness of the fraud, however, which has been committed, the character of the miscarriage of justice which has resulted from the imposition upon the courts in Illinois and the manner in which the defendant here concealed from that court, from those courts, evidence which it had, and the size of the decree for money which resulted from that kind of work upon the part of the Computing Scale Company, is so large, and so endangers the very existence of the plaintiff in this case, that if it were necessary to ask for special indulgence, we would feel that upon the showing we have made here we would be well within our rights to ask for it from and court. But I don't think we are asking for anything except that we should be permitted to proceed in accordance with the usual practice in this particular district. And what I say with respect to the grossness of the fraud which has been perpetrated upon the courts of Illinois, let me stop to say here that it does not refer to counsel—I am informed and believe, that they were kept in ignorance by their own client of the true facts with respect to this matter.

Mr. Tracy:

If your Honor please, in regard to the rule and the statute which was cited, and of course with which we are all familiar—

The Court:

I think Mr. Tracy that we have passed that. We have complied with the statute now.

Mr. Tracy:

Certainly if we come in here and some one was making an argument to the jury, or the court was making a charge to the jury, the court would not have to suspend and take that matter up, and I take it your Honor is much in the same position, having embarked in the trial of a case, that during the progress of the trial, the court would not have to discharge the jury and take up something else. It seems to me it does not apply at all to this situation, although we are not asking for delay; we are ready to go ahead today, tomorrow, or any other time, if the court were able to go on.

Mr. Zane:

Well, if Your Honor please, so far as the talk that is made about fraud, we have shown in our answer, which contains a plea or prior adjudication, of an adjudication of the matters alleged by them twice by the Circuit Court of Appeals—I say we have such a plea in our answer. Now, that matter can be determined by a simple inspection of the records, and if it is a matter determined by the Circuit Court of Appeals twice upon the argument, upon the presentation of the opposite party, then of course this court is not going to sit as a court of review and decide whether the Court of Appeals of the seventh circuit or the District Court of the United States for the Northern District of Illinois has made a mistake in regard to this evidence.

Now, they say that they want you to take oral evidence here, but no statement is made as to what kind of evidence it is, no statement is made as to what that evidence will be, and we are left utterly in the dark except upon the bald statement that they want to take oral evidence upon an application for a preliminary injunction. The statute says expressly that when the matter comes on the day set before the court, in case a temporary restraining order should be granted without notice, the matter of the issuance shall be set down for a hearing at the earliest possible time, shall take precedence and so on, and when the same comes up for hearing, the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so, the court shall dissolve

the temporary restraining order.

Now, there is a mandatory statute, and it seems that it was not enough for Congress to have the provision in the equity rule of the Supreme Court of the United States, but it was enacted into an absolute mandatory statute which was required to be followed by every United States Court. And there is another provision for protection—

Mr. Welles:

May I see your answer.

Mr. Zane:

We have an answer, and we have filed in connection with it three affidavits, which simply go to isolated matters, stated in the answer, *and that is the showing that we make here in answer to the verified bill and the affidavits.*

Now, it ought not—may I ask to have those filed, Your Honor—it ought not to require any great amount of time form the court. All the court will have to do here is to pass upon the question as to whether or not this matter has been adjudicated, That is determined by the record. Of course there are incidental matters of law, but they do not require any extended argument or extended time, and if they are going to offer evidence in detail in support of the allegations of the bill, that would appear to be a wholly unnecessary matter upon such proceeding as an application for a temporary restraining order.

Now, under the statute, we could have obtained upon two day's notice—here is the provision—upon two day's notice to the party obtaining such temporary restraining order, the opposite party may appear and move a dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Now, the whole statute is based upon the idea that wherever a matter of this kind is granted by the court without notice, it is an extraordinary matter, rarely to be indulged in, and when such matter as a temporary restraining order is granted, then the court must at once proceed to the justice of the claim.

The Court:

I agree with you on that proposition, Mr. Zane. But Congress hasn't the power to pass legislation that will rush a court clear off its feet and upset all pending business and require an immediate and continuous performance of hearing an issue of this character until it is completed at the peril of all pending and unfinished business, and at the

risk of, in its haste, not administering the ends of justice. Now, this statute must be interpreted in a sensible way. Its purpose is quite plain, and so far we have complied with its purpose. The purpose of the statute, in these incidents to which the court's attention is directed, is to secure an early hearing of the application for a temporary injunction, and that is all. We have already entered formally upon the hearing of the application. Now, it is the practice in this district, as Mr. Welles has suggested, to hear oral testimony, if the court feels that that is more enlightening than affidavit testimony. We are not restricted to affidavit testimony. If the witnesses were here depended upon for oral testimony, I don't believe that the court is under any obligation—would be under any obligation to break into the pending trial the court has to hear that oral testimony. I don't think so. The statute does not require that. The court would be perhaps upon requirement that, as between two cases contending for its attention—this case and one not in this category—the court would have to give preference to this case, but the statute does not mean that acute business pending before the court and unfinished shall be set aside and this case taken up. It cannot mean that. I doubt whether Congress would have the power to pass such an enactment as that, because it would disturb the orderly course of the administration of justice, and would be an invasion of the province of the court. I think the judiciary department is independent of the legislative in that particular.

Now, if it is apparent on the face of the record that all there is here is, as you say, an attempt to review what has happened in Chicago, of course that will end it very quickly. We won't do that. Wont attempt to do that. The plaintiff in this case has had its day in court on the issues that were decided in Chicago, and it connot regain lost ground by any such application as this. But if it were defeated in that litigation because of impositions upon the court which decided against it, that is, a decidedly different issue. And the issue is altogether too important to be decided without recourse to every source of information that will enlighten the court.

I think I ought to perhaps scrutinize the petition again—I read it at the time the temporary restraining order was issued—to read it in the light of your answer to resatisfy the court's mind, if that can be done, that there is an issue here distinct from the issue decided in Chicago, before the question of the appointing of a special master

is fully determined upon. But it seems to me that we have no refuge now, nothing to do now, but to appoint a special master to assist the court in the exigencies that are before it, if there is an issue separate from the issue decided in Chicago, and if the complainant, as it does, in insists on carrying further its application for a temporary injunction. It seems to me these are largely matters left to the discretion of the court by the statute itself. The statute has some reservations in it. They say we must proceed as expeditiously as the interest of justice require. That leaves something to the discretion of the court. I will take the night to read the petition again and the answer, and decide this question in the morning.

Mr. Welles:

Of course we have had no opportunity to see what is in their answer. It has just been filed, as I understand. It may be that there is something we would direct Your Honor's attention to after reading that and before Your Honor passes upon the question that you are not considering.

The Court:

Well, to give you that opportunity, will pass this matter a little longer, because I am in the midst of a most harassing and exasperating attention-taking trial. I have had less opportunity the last two days to do the thousand and one things that come up to be done at the bench than usual, with a trial in progress, and with the particular witness on the stand now, I think you will appreciate that the court's mind is directed to the business immediately in hand.

Mr. Welles:

Yes, I can well imagine that. There is a provision in this very act which Mr. Zane has read, providing for the extension of a restraining order for a further period, not exceeding ten days.

The Court:

I understand that, but I think you are beyond that now, Mr. Welles. You have entered upon the prosecution of your petition for a temporary injunction.

Mr. Welles:

Yes, I understand that.

The Court:

I think that provision of the statute is now passed. That is my interpretation of it, at any rate.

Mr. Welles:

I think there should be some order, Your Honor, continuing in effect the temporary restraining order pending this hearing.

The Court:

Within that ten day period, of course.

Mr. Welles:

Because it expires today, the order Your Honor put on.

The Court:

Is this the tenth day?

Mr. Welles:

To and including today, is the way the order was drawn.

The Court:

Well, an order may be entered tonight extending the temporary restraining order until—well, if you want time to look at this answer, I will have to say for forty-eight hours.

Mr. Welles:

If I might suggest, Your Honor, wouldn't it be in accordance with the usual practice to continue it in effect during the time the hearing and deliberations of the court are in progress on our present motion.

The Court:

Well, let me read this statute again.

Mr. Zane:

Your Honor, could you fix the time for Saturday morning? I say this for these reasons: The plea we have made and the other points we have made come on before the merits of the bill anyway, and if it appears that our plea is good, of prior adjudication, then of course there would be nothing further to consider, and that could be heard on Saturday, the gentlemen who are associated with us suggest, subject to Your Honor's approval.

Mr. Welles:

Of course, it does not follow that we will agree that the facts that they allege with respect to the plea of prior adjudication. I don't know what they are.

Mr. Zane:

Well, that is record.

Mr. Welles:

So far as the record has been brought to my attention, it does not justify any such statement as Mr. Zane made here as to the facts.

Mr. Zane:

Well, I am speaking advisedly of the record, I was through the litigation.

Mr. Welles:

As Mr. Tracy just suggests, every allegation of new matter in the answer, not an admission of our bill, is presumed by the statute to be denied, so that I don't see how the court can take the answer as true, if it states anything which is not in our bill of complaint.

Mr. Zane:

Did I understand you to say that the statute provides that everything not denied—

Mr. Welles:

Everything in your answer is presumed to be denied without a reply.

The Court:

You are relating to the equity rules aren't you?

Mr. Welles:

Yes, sir.

Mr. Tracy:

So we really don't see how we are going to get very far by reading the answer, under those circumstances.

Mr. Zane:

The preliminary question on every plea is, is the plea sufficient. That is the preliminary question on every plea. It is treated just like a demurrer.

Mr. Welles:

We have in our office three volumes of printed testimony, putting them together they would stand that high above this table, and I take it that whoever decides the question which Mr. Zane raises by his answer must familiarize himself with those three volumes of testimony.

Mr. Zane:

Why, no.

Mr. Welles:

From our examination of that record, we say that it does not contain any such facts as Mr. Zane claims here. Now, he says it does. Now, maybe we haven't examined it far enough. Maybe he knows better then we do, and maybe when we examine it further we cannot sustain our position. But I say in good faith now, so far as we have examined it, we do not find that it sustains what Mr. Zane says.

The Court:

Well, was this alleged fraud question brought to the attention of the court in Illinois?

Mr. Welles:
It never was.
Mr. Zane:
By affidavit.
The Court:
At what stage of the litigation?
Mr. Zane::
First before the Circuit Court of Appeals decided—before the argument in the Circuit Court of Appeals on the first appeal, which was on the question of validity of the patent claimed to be infringed. Then that was on January 21, 1913, and the affidavits filed upon that motion are substantially the affidavits filed today in this court. Then after the court of Appeals had ruled upon that newly discovered evidence for the purpose of a re-hearing, that no diligence has been shown in regard to the matter, then the bill was argued to the Circuit Court of Appeals. The Circuit Court of Appeals rendered its decision on the 15th day of April 1913. Then they had thirty days before mandate went down, or to apply for a rehearing. Then on the 14th day of May, which would be the 29th day—the 14th day of May 1913 they filed their affidavits again upon a motion for the Circuit Court of Appeals to reopen the case, and that was denied by the Circuit Court of Appeals. That is way back in 1913. Then the case went back to the District Court, and the District Court rendered its first interlocutory decree. That interlocutory decree, you see, is rendered after the discovery of this newly discovered evidence that they speak about, and after that newly discovered evidence had been presented to the Circuit Court of Appeals. Then, as I say, the District Court rendered its decree on the 3rd day of March, nineteen hundred—no, on the 5th day of May 1914, this interlocutory decree. That referred the case to a master to take an accounting. Before the master that very evidence that is claimed to be newly discovered was taken by deposition. These various witnesses, Phinney and so on—that testimony was taken by depositions and offered before the master, and the master rejected that testimony. The testimony was incorporated into the record, next presented to the District Court, and the District Court passed upon that testimony. Then it went in the record to the Circuit Court of Appeals, and the Circuit Court of Appeals passed upon that question, and the opinion of the Circuit Court of Appeals is perfectly plain. The last opinion of the Circuit Court of Appeals was rendered in

November 1921. In that opinion the Circuit Court of Appeals goes on to say that this so-called newly discovered evidence had been presented upon an appeal or review to the Circuit Court of Appeals back in 1913, but it is now presented again, and treated that application as a bill of review to open this decree for this newly discovered evidence, without passing upon the merits of that question then. That is the last time.

So you see that instead of being twice before the Circuit Court of Appeals, it was three times before the Circuit Court of Appeals. And, Your Honor, if the brief of the counsel who then represented The Toledo Computing Scale Company—and it is only by continually changing its counsel and getting counsel in who are not acquainted with the record that counsel make these different propositions. These gentlemen are new to the case. We are not charging them with any misrepresentation or anything else, but they are not acquainted with the record. That is the trouble. But, as I was going on to say, in that last appeal before the Circuit Court of Appeals, in their brief—and we quote the language in this pleading of ours and there cannot be any doubt about it—they make the point as to this suppression of evidence and so on, and they say this:

> "As shown by the unanswered and uncontradicted affidavits in the printed record on defendant's motion to reopen this case * * * the plaintiff had full knowledge of the Phinney scale" (that is, the plaintiff whom they were charging with the fraud "throughout the present litigation, having previously brought a suit at Philadelphia upon the patent here involved, in which case columinous evidence and exhibits respecting the Phinney scale were introduced by the defendant, and as the result of which the plaintiff voluntarily dismissed and discontinued the suit. Defendant in the present case had no knowledge whatever of these matters until after the former decision of this court, as shown in the record on the motion to reopen above referred to, and as soon as they were descovered it promptly presented that motion. To refuse to consider the evidence in the present record respecting the Phinney scale, as affecting the validity of the patent in suit, would be to permit the plaintiff to take advantage of its concealment of essential facts known to it and unknown

to the defendant or the court and its consequent imposition on both."

They presented that issue of the suppression of evidence, secretion of evidence and imposition on the court to the Circuit Court of Appeals, and here is what the Circuit Court of Appeals said about it:

> "Respecting the insistence that, on the proofs offered to the Master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1913 petition to reopen the case on the merits, should reverse our precedent decree upholding the validity of the patent, and should reverse the District Court's decree of 1914 and 1919 with the direction to dismiss the bill, we say:
>
> A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leads us to reject the demand.
>
> B. If it be regarded as a petition in the nature of a bill of review, appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review on the same ground, inclines us to stay our hands."

All these years, eight years, had elapsed, before they presented their second bill of review and the court passes upon the matter that way. But that was not all. Your Honor. They then proceeded to file their petition for a writ of certiorari to the Supreme Court of the United States, and here is the point they make to the Supreme Court of the United States. That was filed on the 17th day of December, 1921, last month. They served it upon us the 17th day of December. It was presented to that court on the 3rd day of January, 1922, and the Supreme Court of the United States on the 9th day of January denied their petition for writ of ceriorari. But in their application for the writ of certiorari they make this point, and this is quoted exactly from their petition. We have the petition here, and there will be no question about what it is. Here is what their counsel said to the Supreme Court of the United States:

"At the time the original record was made up defendant had no knowledge of any commercial manufacture and sale of the Phinney scales. It acquired knowledge of them while the appeal form the decree of the District Court was pending, and it moved in the Court of Appeals for leave to dismiss its appeal as to the reissued patent in suit, in order that the District Court might entertain an application to reopen the case for the newly discovered evidence. This motion was denied by the Court of Appeals. Upon the handing down of the opinion of the Court of Appeals defendants at once petitioned that court 'to include in its mandate to the District Court permission to said District Court to entertain and consider, and if so advised to grant, an application of the defendant for leave to introduce proofs in said cause respecting' said scales, supporting said petition with voluminous affidavits showing the reissued patent in suit to have been substantially anticipated by the Phinney scales, and showing further the diligent efforts of the defendant to fully develop the prior art in the making up of the original record, and the manner in which the newly discovered evidence finally came to its knowledge. The affidavits further showed"—and this they underscore in their petition and print in italics—*"that plaintiff had had full knowledge of the Phinney scales for more than ten years."*—meaning by the plaintiff The Computing Scale Company—that evidence and numerous samples of them had been introduced in a suit which plaintiff had brought at Philadelphia ten years earlier upon the reissued patent here in suit, that the prosecution of said suit had been abandoned because of such evidence, and that plaintiff"—that is, the Computing Scale Company—"had suppressed and concealed such fact from the court and defendant throughout the litigation in the present cause."

You see they make the point and present it. Now, Your Honor, there is a decision of the Supreme Court of the United States right squarely in point, that if they have made the application upon what they claim is their new evidence, to the court that had jurisdiction of the case, and that court has passed upon it, it is a prior adjudication and

that matter is ended and cannot be made the basis of a bill to set aside that judgment for fraud. The reason is that they are charging the court with fraud. Here on this very bill that is before Your Honor they are not charging the plaintiff alone with fraud, but they are charging that they presented the evidence to the District Court of the Northern District of Illinois, they are charging that they presented that same evidence to the Circuit Court of Appeals for the Seventh Circuit, and they are saying to Your Honor that those courts carry into their decrees a fraud upon this plaintiff which is bringing this bill before Your Honor and they are asking Your Honor to sit in judgement upon the District Court as to whether it committed error in not accepting that evidence as conclusive and they are asking Your Honor to pass in judgment upon the Circuit Court of Appeals for the same reason, and, even more, Your Honor, they are saying that they went before the highest tribunal in the land and presented that same point of suppression and concealment of evidence, and that highest court in the land has carried into its judgment that same fraud by refusing their petition for a writ of certiorari and letting the decree stand. If Your Honor will just read paragraph 5 of our plea you will see that the question that is presented to Your Honor here is without the slightest merit. It is insubstantial. It has been passed upon by three courts, and it has been passed upon by another tribunal, the Master, and their very bill will show the fact, if you consider that bill in connection with what is shown in our plea.

Now, Your Honor, here is a long litigation. It was begun in the year 1910. As you read the opinion of the Circuit Court of Appeals in this case you will see the astonishment that the Circuit Court of Appeals expresses that a defendant in an infringement case could for this length of time prolong the day that it was required to account for its infringement of a patent. The case was begun in 1910. The first interlocutory decree upon the merits was heard after this evidence was discovered in 1914, and then from 1914 until June, 1917, the accounting went on before the Master, years have elapsed, and now they come in to set up before Your Honor as a ground of fraud to impeach a decree of a court of coordinate jurisdiction, confirmed by two appellate courts, the very matter that was set up back in 1913. I cannot believe that such a matter as this can be considered, Your Honor, as a meritorious showing.

And, Your Honor, let me speak of this matter. The

mandate from the Circuit Court of Appeals in this case has not gone to the District Court of the United States for the Northern District of Illinois. It is true that the Supreme Court of the United States has made an order denying the petition for writ of certiorari, but that order has not been presented to the Circuit Court of Appeals. The mandate is stayed from the Circuit Court of Appeals until that order comes down, and at this very moment they have an opportunity to present anything they claim, either to the Circuit Court of Appeals, or, when the mandate shall have been issued by the Circuit Court of Appeals, to the District Court, they have the opportunity to present this matter for relief to those courts. The courts are open to them. Full opportunity is given to them to present this matter to the court that knows the record, yet, Your Honor, they come here in this jurisdiction and ask to have Your Honor pass upon the propriety of the decisions of those courts. It does not seem right to me.

Why, I should regard it as a reproach upon the law—and worse than a reproach upon the law, almost a disgrace to the law—after this long ligitation has taken place, which has probably taken all the money that will be realized upon it, hundreds of thousands of dollars, in the way of carrying on the litigation, and after the litigation has ended by the final and last decree of the upreme Court of the United States, that they should now be permitted to come in with this suggestion upon matters that they admit were discovered back in 1913, and which they have insisted upon as fraud and suppression of evidence both to the Circuit Court of Appeals of the United States and to the Supreme Court of the United States. It would not only be a reproach to the law if that thing could take place, but what would be the advantage of men appealing to courts for their rights and having their rights confirmed if on such a flimsy ground as this a final enforcement of the decree is to be enjoined by Your Honor as against these courts of the United States of coordinate jurisdiction and the Circuit Court of Appeals of the United States in Illinois.

Mr. Welles:

If Your Honor please, I can and will very briefly endeavor to answer what Mr. Zane has said, and I approach my discussion of the record now with considerable more confidence than before he made his argument to Your Honor for the reason that he has apparently entirely fail-

ed to grasp what this case is about or what the allegations in this bill of complaint are.

We have alleged in here that this Dayton company went out and bought up the only scales which there were in existence which demonstrated the fact that the patent upon which they sued in Chicago was invalid. They went out not once but several different times, not doing a complete job each time, and bought up these scales with the express purpose of bringing suit, which they did bring, against this defendant after they had succeeded in buying up scales and depriving the defendant of the opportunity of defending against the patent because of the prior existence and use of that particular scale.

That issue has never been presented to any court for the reason that this plaintiff never knew that the Dayton Company had done that fraudulent thing. The evidence which was presented in the former record—and of this I speak with confidence, for I have read that part of it—deals with the facts that the scale had been used, that there were numerous users of this socalled Phinney scale, that it was in fact an anticipation, that it was in fact a complete defense had it been discovered in time, and the application was made to the court in Chicago for leave to put in newly discovered evidence with respect to the Phinney scale, and it was stated to the court in Chicago that this Dayton Company had knowledge of the existence of the Phinney scale at the time it brought its suit and concealed that knowledge and suppressed that knowledge and was guilty in that way of suppressing evidence. But there was no suggestion, for the reason that the Toledo Company had no knowledge of the fact, that the Dayton Company had gone out and bought up the evidence and secreted it and destroyed it.

There is a vast difference under the authorities between a knowledge upon the part of the plaintiff that there is a defense to his claim if the defendant can discover it, and an active purchase of that evidence and secretion and destruction of it by the plaintiff for the purpose of establishing a fraudulent claim against the defendant. The first claim that there had been guilty knowledge upon the part of this plaintiff, that there had been perjury upon the part of this Dayton Company's witnesses, in fact, was presented on an appeal to the discretion of the Circuit Court of Appeals. But the evidence was, as I have said, not in existence to the knowledge of the present plaintiff. It had no knowledge that the Dayton Company had gone out and

deliberately contrived a scheme for the purpose of depriving this plaintiff of its defense, and that is what we are presenting to Your Honor here an issue which has never been presented to any court.

The bill of complaint alleges, first, that a suit was started in this court in 1907 by the Dayton Company against the Toledo Company on this same patent, the Smith patent. "While the same was pending, said The Computing Scale Company, through its officers, agents and representatives, in further pursuance of said conspiracy secretly engaged in an effort to find all of the Phinney scales which had been manufactured with said lightweight skeleton cylinder and which were not already in its factories and in the custody of said company's counsel in said case against The Federal Scale Company, and said The Computing Scale Company did locate and secretly purchase"—and now I ask Mr. Zane from his familiarity with the record in Chicago to Call Your Honor's attention to testimony there by any witness to the effect that "The Computing Scale Company did locate and secretly purchase and take into its possession a number of said Phinney scales, the exact number being to this plaintiff unknown but well known to the defendant. The Computing Scale Company"? And where is this found, Mr. Zane: "Said scales so purchased and taken into its possession were, as plaintiff is informed and believes, and therefore avers, all of which it could obtain possession and all but one or two of said Phinney scales which were then in the hands of users thereof?" "Or this: "The purpose of said The Computing Scale Company in so searching for and taking possession of said scales was to and it did destroy or secrete the same and thus suppress and keep from this plaintiff and from the courts in which the said The Computing Scale Company had brought or might bring suits all knowledge of the fact that said Smith reissued patent No. 11536 was invalid because of the prior invention and public use of a substantially identical device manufactured by said Phinney under his patent as aforesaid."?

We set up our bill of complaint the evidence upon which counsel relies as showing that this issue was submitted to the Chicago court, and show how it was not. We shown the distinction between the issues which Mr. Zane is talking about and the one which we now have here.

Your Honor will recall that when the matter of the

granting of the temporary restraining order was up I stated to Your Honor that was a fact that in the briefs in the Chicago court there was the claim that The Computing Scale Company had suppressed evidence, but that that claim was based upon the ground that The Computing Scale Company had knowledge of the defense and concealed the knowledge and not that it had gone out and destroyed the defense.

It is alleged in the bill of complaint: "This plaintiff as appellant in said proceeding did not present to said Circuit Court of Appeals either in the record taken before the Master or in said District Court or otherwise, and evidence with respect to the fraudulent suppression of evidence by said The Computing Scale Company for the reason that plaintiff had no knowledge that said The Computing Scale Company had purchased and secreted or destroyed any of said Phinney scales until on or about the 20th day of December, 1921, and long after the second decision of said case by said Circuit Court of Appeals. This plaintiff never has had its day in court to present to any court on its merits the true facts with respect to the manufacture, sale and successful use of computing scales under the Phinney patent" and so on.

We have offered, Your Honor, here an affidavit of Mr. Charles W. Owen after examining several of these Phinney scales which we finally got hold of, some of those which had been kept out of access of the public by a stipulation in the Philadelphia case. Mr. Owen says that the Phiney scale is a complete anticipation of the Smith patent upon which this judgment for half a million dollars has been obtained, and the evidence in the other affidavits shows beyond all question, proves beyond a reasonable doubt, the open and public use of that scale, of the successful use of it, the approval of it by the official sealer, for years and years prior to the time Smith first applied for any patent upon this subject.

I say to Your Honor that when you get into this, far from finding that you are asked to review any action of the District Court of Illinois or the Circuit Court of Appeals for the Seventh Circuit, you will find you are asked to pass upon a question which was never presented to those courts, and that you are asked now to correct the grossest injustice, I think, that has ever been brought to Your Honor's attention by judicial decree, and that judicial decree obtained by active fraud of the party who prevailed in that

court. I have no criticism whatever to offer of the Illinois courts for their decisions on the record which was before them. We admit that that is a bringing decision upon this present plaintiff, so far as the issues were permitted by this Dayton Company to be presented to and passed upon by that court. But insofar as this Dayton Company kept those courts by its own wrongful acts from passing upon the issues made, to that extent those issues are here for the determination of Your Honor.

Mr. Zane:

May I be allowed another word, Your Honor?

The Court:

Just briefly, Mr. Zane. I think I see what I have before me.

Mr. Zane:

Here is an affidavit which they filed in 1913, and it is the affidavit of Thomas Z. Phiney.

The Court:

You have it in your answer?

Mr. Zane:

Yes, we have set out for Your Honor's convenience in parallel columns opposite each other the affidavits filed in 1913 and the affidavits filed on this motion. Now, in that affidavit of Thomas Z. Phinney they refer to the matter of—

The Court:

Of course, I will read this answer, but is not this what is before the court at the threshold in this hearing: The court is called upon to determine whether there is a divergence between the issue here and the issue presented apparently on the same lines to the court in Illinois. If there is, and that divergence is substantial or radical, then of course it cannot be said that we are asked to review what the court in Illinois has done. I will say right now that there must be a substantial distinction between the issue here made and the one made of apparently the same character before the court in Illinois; otherwise the matter is *res Judicata*. I believe that I have enough before me to decide this question without further argument, in the allegations of the bill and in what you have in your answer which I conceive the plaintiff will not deny. If this plaintiff wants to deny those matters, we can hear from it later.

It is simply impossible to carry on this hearing in view of what the court is now engaged in. There can be no substantial prejudice to the parties if the court, is allowed time

enough to get its bearings on these sharp contentions that you are making this afternoon. As you say, the mandate of the Supreme Court is not yet down to the Circuit Court of Appeals nor from the Circuit Court of Appeals down to the District Court in Illinois. So I am minded to do this—to enter an order right now extending this temporary restraining order within the statute for a period of ten days to give the court a chance to see what there is in this record. If you want to present any views in writing during that period or to file additional affidavits, and do it within a reasonable time, you may do so. If I reach the conclusion that we are not asked to do the absurd thing of reviewing the judgment of the District Court and the appellate courts but have an issue here that is distinctly and substantially different from that already decided, then I will be forced to appoint a special master to take testimony and continue this hearing, because the issue is too momentous to be forced too rapidly, and we simply cannot take it over. If I reach the contrary conclusion, the plaintiff has its rights to review. I think the court has some latitude of discretion here that permits me to do this, and that is the course I will take with it.

(Adjournment).

State of Ohio, Lucas County, ss.

William J. Fritsche, being first duly sworn, upon his oath says that he correctly reported in shorthand the proceedings had in the United States District Court for the Northern District of Ohio, Western Division, on January 19, 1922, in the case of The Toledo Scale Company, Complainant, vs. The Computing Scale Company, et al., Defendants, up to a point where he was relieved and succeeded by one, Fred H. Kruse, in the reporting of said proceedings; that his shorthand notes included all that was said upon said hearing by the several counsel who took part therein and by the Court up to the time he was so relieved and succeeded; that his said notes have been correctly transcribed, and that that portion of the foregoing transcript contained on pages numbered from 2 to 18, both inclusive, and the first four lines on page 19, ending with the sentence, "That is the last time," is a true and correct transcript of his shorthand notes thereof.

William J. Fritsche.

Sworn to before me and subscribed in my presence this 24th day of February, 1922.

Elmer L. Skidmore, Notary Public, Lucas County, Ohio.

State of Ohio, Lucas County, ss.

Fred H. Kruse, being duly sworn, upon his oath says that he correctly reported in shorthand the proceedings had in the United States District Court for the Northern District of Ohio, Western Division, on January 19, 1922, in the case of The Toledo Scale Company, Complainant, vs. The Computing Scale Company, et al., Defendants, from a certain point where he relieved and succeeded on William J. Fritsche, and to the conclusion thereof; that his shorthand notes included all that was said upon said hearing by the several counsel who took part therein and by the Court during said times; that his said notes have been correctly transcribed, and that the foregoing, commencing with the first paragraph on page 19 to the close thereof on page 32 is a true and correct transcript of his shorthand notes thereof.

Fred H. Kruse.

Sworn to before me and subscribed in my presence this 24th day of February, 1922.

Elmer L. Skidmore, Notary Public, Lucas County, Ohio.

EXHIBIT NO. 7

In the District Court of the United States for the Northern District of Ohio, Western Division.

The Toledo Scale Company,

Complainant,

vs.

Computing Scale Company, et al.,

Defendants.

ORDER.

This cause coming on to be heard, pursuant to the former order of the court, upon application of complainant for a temporary injunction, the complainant offered, as tending to support the averments of the complaint, the verified complaint, together with the several affidavits thereto attached and other affidavits as shown by the record, and further orally moved the court for permission to introduce additional testimony, to be taken in open court and by affidavit. Thereupon came the defendant and tendered for filing and filed its verified answer and three affidavits, and

orally moved the court to dismiss this case for that it appears from the record that the issue thereof was *res adjudicata*.

The court finding itself in the midst of a protracted jury trial to which the United States is a party, and burdened with much other pending and uncompleted work, and finding no opportunity to presently consider either the said motion of the complainant for leave to introduce further testimony, as aforesaid, or the said motion of the defendant to dismiss for the reason aforesaid, it is ordered that the temporary restraining order heretofore granted herein be and the same is continued in full force and effect for ten days or until, within that time, the court may find it possible to give attention to said several matters.

John M. Killits, Judge.

January 19, 1922.

EXHIBIT NO. 8

AFFIDAVIT OF IRA CHASE KOEHNE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al.,

Defendants.

State of Ohio, Lucas County, ss.

Ira Chase Koehne, being first duly sworn upon his oath, says that he is fifty years of age and is a resident of the City of Indianapolis, Indiana; that he is now engaged in the practice of law in said City and was first admitted to the bar of any court April 25, 1921.

Affiant is an inventor and prior to April, 1895, had invented and applied for patents upon certain improvements in spring scales. In the month of April, 1895, affiant entered into a contract with the Computing Scale Company, the defendant in the above entitled action, by which contract affiant was to and did enter into the employ of said defendant for the purpose of developing the spring scales invented by affiant, the manufacturing rights to which were assigned by affiant to said defendant. Affiant remained in the employ of the defendant under said contract for about a year and then entered upon a different relationship with the said defendant The Computing Scale Company by which

he received compensation upon an annual basis and devoted to the interests of that company such portion of his time as it required.

Affiant's relationship thus entered into continued in effect until about the spring of 1902 and during the period from about 1896 until about the spring of 1902 affiant devoted practically all of his time to the service of said defendant company. Affiant's duties during said period were in connection with the development of patented devices and as time went on affiant's duties increasingly became broader and his responsibilities in connection with the efforts of the defendant company to become supreme in the computing scale business increased.

O. O. Ozias during all of said period was an officer and general manager of said The Computing Scale Company and was affiant's immediate superior in the work in which affiant was engaged, and affiant was during said period in practically daily conference with said O. O. Ozias. During said period Edward Canby and Charles James were also officers of said The Computing Scale Company and said Canby and said Ozias were directors.

During said period one Joseph Hopkinson was assistant superintendent and then superintendent of the factory of The Computing Scale Company. One George Ludlow was in the employ of said defendant also and in charge of its sales activities in certain portions of its territory, and after the Moneyweight Scale Company was formed said Ludlow became its Vice-President.

At the time affiant first became connected with said defendant The Computing Scale Company said company was engaged in an effort to obtain a monopoly of the business of manufacturing and selling computing scales of all types. Said O. O. Ozias was the person who was in charge and who up to the time of his death in about 1911, remained in charge of the campaign of The Computing Scale Company to that end.

After affiant had been with The Computing Scale Company about a year he became Mr. Ozias' chief assistant in the activities of said The Computing Scale Company in the effort to monopolize said business, and affiant continued in that capacity, becoming increasingly more active and in closer touch with the activities of the company in said matters up to the spring of 1902. From the spring of 1902 on, for at least three years, affiant continued to receive an annual retainer from said The Computing Scale Company for which he was obligated to and did render its services in

consultation, with respect to the same matters which had been under his charge as the assistant of said Ozias during the former period above mentioned. After the expiration of said period during which affiant received said annual retainer he from time to time for several years rendered services upon request of said The Computing Scale Company, affiant's office being and remaining up to the year 1918 in Dayton, Ohio. Throughout all the period during which affiant was under employment or under retainer, or was receiving occasional employment from said The Computing Scale Company, as hereinbefore set forth affiant was under agreement to said company that he would not disclose while so employed its activities in the matter of monopolizing the said business, or disclose to others knowledge which he might have with respect to the validity or invalidity, or of facts affecting same, of patents owned or controlled by said The Computing Scale Company. During all of said period affiant kept all of such matters to himself in accordance with such agreement and did not disclose to The Toledo Scale Company or to anyone connected with it any of the facts in this affidavit set forth, and would not have made such disclosure to anyone not connected with The Computing Scale Company had request been made to him to disclose any of said facts. Affiant did not disclose any of said facts to The Toledo Scale Company or anyone connected with it or to anyone else not connected with The Computing Scale Company until January 13, 1922.

Affiant is not now in the employ of The Computing Scale Company and has no relationship of any kind with it, and is at liberty to state the facts hereinafter set forth.

In the course of his employment with the defendant The Computing Scale Company affiant became familiar with scales which were manufactured by a company known as the Boston Computing Scale Company under patent Reissue No. 11536 obtained by Albert U. Smith, and affiant also became familiar with a patent granted to one William H. Phinney August 30, 1870, being United States Patent No. 106869.

It was desired by The Computing Scale Company, in pursuance of its purpose to monopolize the computing scale business, to acquire from the Boston Computing Scale Company, its rights under Reissue Letters Patent No. 11536, and to acquire the business of the Boston Company as well. Said of what was done in said matter, and Ozias price

Ozias was in charge for the Computing Scale Company of the matter of acquiring said business and said patent from said Boston company, and affiant as the assistant of said Ozias was in frequent consultation with Ozias with respect to said matters and was kept fully advised by said Ozias of what was done in said matter and Ozias and affiant were in frequent consultation as to the means to be employed to acquire the said business and patent of the Boston company at the most advantageous price and terms.

Said Ozias had the same knowledge with respect to the Phinney patent No. 106869 as was possessed by affiant, and prior to the purchase by The Computing Scale Company of the Boston company's patent and business, said Ozias informed affiant of the fact that said Phinney had manufactured and sold scales under the said Phinney patent, and that said scales so manufactured and sold had indicating cylinders of very light skeleton construction covered with very light material usually paper. Said Ozias at about the time he made said statement to affiant caused one or more of said old Phinney scales to be purchased and shipped to the plant of The Computing Scale Company at Dayton, and thereupon upon examining same affiant, basing his opinion upon his knowledge of the scale business and his examination of said scale and experience with patents and his mechanical knowledge and experience, reached the conclusion that inasmuch as said Phinney scales had been manufactured, sold and used more than two years prior to the application for the original Smith patent that said Smith patent had been completely anticipated by such manufacture, sale and use of said Phinney scale, and that the manufacture of a computing scale using the cylinder of the kind above described, used by said Phinney, was free and open to the world and in no wise restricted by the claims under said Reissue Patent No. 11536 then owned by said Boston company, and affiant so advised said Ozias and said Ozias informed affiant that he had reached the same conclusion by his own independent investigation and consideration of said patents and of said manufactured scales. It was thereupon decided in conference between said Ozias and affiant that it would be in the interests of The Computing Scale Company to manufacture a computing scale using a light weight indicating cylinder such as that manufactured by said Phinney, and putting same out for what was known to said The Computing Scale Company and commonly termed as a

"knocker", that is a scale designed for the purpose of eliminating a competitor, and that such scale should be so manufactured for the purpose of eliminating the competition of said Boston Company.

Before this plan was put into operation, however, it was decided by said Ozias, as affiant recalls, upon affiant's suggestion that an effort should first be made to see whether the patent and business of the Boston company could be acquired at a lower price than the amount of expense which would be involved, in engaging in the manufacture of said light weight cylinder scale by The Computing Scale Company, including the expense necessary to a campaign to suppress the competition of the Boston company.

Said Ozias was in charge of the matter of the negotiation for the purchase of the patent and business of the Boston company and discussed with affiant the best method of handling said matter before said negotiations were undertaken, and it was concluded by said Ozias and affiant that in such negotiations said Ozias should take the position that the Smith patent No. 11536 was invalid because of the anticipation thereof by the manufacturer, sale and use of the Phinney scales hereinbefore described, and said Ozias, while said negotiations were in progress and afterwards, stated to affiant that he had used said argument in said negotiations and by means thereof had succeeded in acquiring the Reissued Patent No. 11536 and the Boston business of the Boston Scale Company at a very much lower figure than the original asking price.

After The Computing Scale Company had acquired said Reissue Patent No. 11536 and the business of said Boston Company it began the manufacture of Computing Scales using a light weight skeleton indicating cylinder covered with paper, claiming to manufacture same under said Reissue Patent No. 11536, and in order to support claim that it had the exclusive right by virtue of said Reissue Patent No. 11536 to manufacture that type of computing scale The Computing Scale Company instituted a search for scales manufactured by Phinney under his patent No. 106869. Said effort to find and acquire said Phinney scales extended over a number of months and resulted in quite a number of said scales being acquired by The Computing Scale Company, and said Ozias and affiant were of the opinion that all which could be found by The Computing Scale Company had been found and acquired.

To the best of affiant's recollection it was several years after The Computing Scale Company had acquired the said patent and business from the Boston Company that computing scales of a similar type were put upon the market by two other concerns, one the Automatic Scale Company, one of whose sales agents was the Federal Scale Company, and by Landers, Frary and Clark, one of whose sales agents was one R. T. Randall. Suits were brought in the year 1901 by the Computing Scale Company against said Federal Scale Company and against said Randall, alleging that the scales which they were selling were infringements of said Smith Reissue Patent No. 11536. The filing of said suits was directed by said O. O. Ozias and said suits were begun in the United States Circuit Court for the Eastern District of Pennsylvania. The counsel for the Computing Scale Company in said case were Church and Church of Washington, D. C. Neither said O. O. Ozias nor affiant, or to affiant's knowledge, anyone else connected with the Computing Scale Company, informed said Church and Church or anyone connected with said firm of the fact that scales had been manufactured and sold by said Phinney and put in use many years before the Smith application had been filed, or that any of said Phinney scales embodying said light weight cylinder had been purchased by The Computing Scale Company. Said suits were brought by Church and Church in good faith and in ignorance of the fact that the claim asserted by them in behalf of The Computing Scale Company to the effect that said light weight skeleton cylinder covered with light weight material had been first invented by said Smith was untrue, although said Canby, the president of The Computing Scale Company and said Ozias and other officers and directors of said company knew at the time said suits were filed that said allegation was not true.

Said Ozias informed affiant some months after the filing of said suit against said Federal Scale Company in the Eastern District of Pennsylvania that the defendant therein had taken testimony showing the prior manufacture and use of the Phinney scale and introduced in evidence three of said Phinney scales embodying said light weight cylinder that had been in use many years before the Smith application had been filed, and Ozias further informed affiant that he had been advised by Church and Church, counsel in said case for The Computing Scale Company that in their opinion said evidence constituted a complete

defense as to the claims asserted by The Computing Scale Company based upon the Smith reissue patent No. 11536 with respect to the claims therein based upon a light weight cylinder covered with light weight material. Said Ozias at said time informed affiant that it had been decided not to press said case in Philadelphia against the Federal Scale Company and said Randall to trial because of said evidence which the defendant the Federal Scale Company had obtained.

After said conversations between Ozias and affiant, said Ozias informed affiant that he, the said Ozias was having a renewed search made for Phinney scales for the purpose of finding all of those which had not been found in the earlier search or produced by the Federal Scale Company, and as a result of said renewed chase by said The Computing Scale Company to affiant's knowledge. Affiant and said Ozias then believed that all of said scales which had been sold by said Phinney had been found and acquired either by The Computing Scale Company or were in evidence in said Federal Scale Company case.

Said Ozias stated to affiant at one time after said renewed search for said Phinney scales had been made that he believed that by keeping Church and Church on retainer for The Computing Scale Company so that their knowledge of the Phinney scales would not be available to others, and by employing other counsed to bring additional suits that might be necessary that the position of the Company with respect to the validity of the Smith reissue patent No. 11536 might from time on be maintained by litigation. Church and Church were in fact thereafter employed upon regular retainer by said Computing Scale Company upon other matters but were in no case asked to assert the validity of Smith reissue patent No. 11536.

About the year 1906 the Toledo Scale Company engaged in the manufacture of cylinder scales having a light weight indicating cylinder substantially the same as those manufactured under the Smith reissue patent No. 11536 and under said Phinney patent No. 106869. Shortly after the Toledo Company engaged in the manufacture of said scales suit was brought by The Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Northern District of Ohio, Western Division based on Smith reissue patent No. 11536.

Said suit was filed in the year 1907. In said suit the counsel for the Computing Scale Company were Messrs. Staley and Bowman of Springfield, Ohio. Said Ozias consulted affiant with reference to the choice of counsel to represent The Computing Scale Company in said suit in the Northern District of Ohio against the Toledo Scale Company, and said Ozias stated to affiant in substance prior to the beginning of said suit that The Computing Scale Company had not and would not disclose to said Staley and Bowman the facts with reference to search for and purchase and secreting of the Phinney scales by said The Computing Scale Company.

Affiant does not recall the exact date of the death of O. O. Ozias, but does recall that it was after the suit had been begun by The Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Eastern Division of the Northern District of Illinois, and shortly before his death said Ozias stated to affiant in substance that he thought they, meaning The Computing Scale Company had now succeeded in gathering up all of the old Phinney scales, that they had made a renewed search for them before filing the suit in Chicago, that they thought they had found them all before, but that now he thought all of the scales were out of the way and it was safe to go ahead with the litigation to maintain the validity and infringement of the Smith Reissue Patent.

Affiant says that at the time the suit of The Computing Scale Company was begun in the Eastern Division of the Northern District of Illinois, and at the time testimony in behalf of the Computing Scale Company was taken therein, Edward Canby, the then President of The Computing Scale Company, O. O. Ozias, the then Vice-President and General Manager of The Computing Scale Company, and Joseph Hopkinson, the then Superintendent or Assistant Superintendent of the Dayton plant of The Computing Scale Company, to affiant's personal knowledge, each knew of the fact that scales had been manufactured by said Phinney with light-weight indicating cylinders of skeleton construction covered with paper more than two years before the Smith original application was filed in the United States Patent Office, and that said Phinney scales had been more than two years prior to the filing of said Smith original application sold and used by a number of users; and each of said officers and persons connected with The Computing Scale Company at the times above mentioned, to affiant's personal

knowledge, knew of the fact that The Computing Scale Company had purchased or caused to be purchased all of said Phinney scales which it could find, other than those which were exhibits in said Federal Scale suit, and each of said officers and persons connected with said The Computing Scale Company at the times above mentioned knew that said The Computing Scale Company had had in its factory at Dayton, prior to the time said suit was filed in the Eastern Division of the Northern District of Illinois against The Toledo Scale Company a number of said Phinney scales which had been purchased from the users thereof, in which said scales said light-weight indicating cylinders covered with paper were used.

Affiant further says that he knows of his own knowledge that the purposes of the Officers and Directors of The Computing Scale Company in purchasing or causing the purchase of all of the Phinney scales which it could find as hereinbefore set forth was to suppress the same and to deprive persons sued for infringement of the Smith reissue patent No. 11536, including The Toledo Scale Company, of all opportunity to prove that by the manufacture and use of the Phinney scales said Smith patent had been anticipated and was invalid, and that said Edward Canby, O. O. Ozias and Charles James to affiant's knowledge were familiar with said purpose and designs, and affiant was informed by said O. O. Ozias that George Ludlow and Samuel M. Hastings were also familiar therewith.

Affiant to the best of his recollection did not personally buy any of the Phinney scales, but the salesmen of The Computing Scale Company who were in the territory where the Phinney scales had been sold, which was a somewhat restricted territory in the New England states, were instructed to be on the watch for said scales at all times during the periods when the search therefor was on, and were under instructions to offer the owners of such scales exceptionally good terms and inducements therefor, and said salesmen on their part were given extra compensation for locating and purchasing such scales and reporting those, if any, which they located but were unable to purchase.

Affiant saw the scale hereinbefore mentioned which was acquired by The Computing Scale Company prior to its purchasing of the patent and business of The Boston Computing Scale Company and which had been sold by said Phinney and to his knowledge The Computing Scale

Company had in its plant at Dayton for many years one or more of the said Phinney scales which were as hereinbefore stated complete anticipations of the light weight cylinder feature of the Smith reissue patent No. 11536.

Affiant is not able to state whether the defendant Company still had any of said Phinney scales remaining in its possession after a fire which destroyed the plant of The Computing Scale Company about the year 1909.

As hereinbefore stated affiant is engaged in the practice of law at Indianapolis, Indiana, and is not now in the employ of the plaintiff, the Toledo Scale Company, or of the defendant, the Computing Scale Company, and has no interest of any kind whatsoever in the above entitled case.

Further affiant saith not.

(Signed) Ira Chase Koehne.

Sworn to before me and subscribed in my presence this 26th day of January, 1922.

Frank E. Miller
Notary Public, Lucas County, Ohio.

In the District Court of the United States for the Northern District of Ohio, Western Division.

AFFIDAVIT OF BORDER BOWMAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Toledo Scale Company,
Plaintiff,
vs.
The Computing Scale Company et al.
Defendants.

State of Ohio, County of Clark, SS.

Border Bowman, being first duly sworn, upon his oath says that he is an attorney at law and has been since 1898 a member of the firm Staley and Bowman, which firm has been since said year engaged in the practice of law with offices at Springfield, Ohio. That said firm represented The Computing Scale Company of Dayton as its counsel in certain matters, from about the year 1900 up to until some time in the year 1910 or 1911, and represented said company as its patent counsel in a number of matters during said period.

Affiant has known Ira C. Koehne for many years and knows that said Koehne acted for The Computing Scale Company in patent matters, and that he was for a number

of years the righthand man of O. O. Ozias, General Manager of said The Computing Scale Company in patent matters. Said Koehne, to affiant's knowledge, was intimately associated with said The Computing Scale Company and knew and was in position to know its private affiirs in reference to patents and patent litigation; and said Koehne came into frequent contact with affiant's partner. Paul A. Staley, but not with affiant, during said period.

Affiant and his partner, Paul A. Staley, prepared the bill of complaint in the case brought by said The Computing Scale Company against the Toledo Scale Company in the United States Circuit Court for the Northern District of Ohio, Western Division in the year 1907, based upon the Smith Reissue patent No. 11536 covering certain alleged improvements in computing scales. Neither O. O. Ozias, Edward Canby, George Ludlow or Ira C. Koehne, nor any other person connected with said The Computing Scale Company, informed affiant or, to affiant's knowledge, any person connected with the firm of Staley and Bowman, that a stipulation had been entered into whereby certain scales manufactured by one Phinney, which were in evidence in certain suits brought by The Computing Scale Company on said Smith Reissue Patent No. 11536 in the United States Circuit Court for the Eastern District of Pennsylvania and certain depositions referring to said scales taken in said suits were kept off the record; and that none of said persons informed affiant or, to his knowledge, any person connected with the firm or Staley and Bowman, that said "Exhibit Scales" so manufactured by said Phinney were at any time in the possession of any counsel for The Computing Scale Company; and none of said persons informed affiant, or to his knowledge any person connected with the firm of Staley and Bowman that said The Computing Scale Company had purchased or in any manner acquired any scales embodying cylinders of the type aforesaid manufactured by the said Phinney or any one else; and that affiant and, to his knowledge, no person connected with the firm of Staley and Bowman had any knowledge at any time that said The Computing Scale Company had in its possession at any time any such scales manufactured by said Phinney with an indicating cylinder of the character above mentioned.

Affiant further says that neither he nor, to his knowledge, any person connected with said firm of Staley and Bowman at any time had any knowledge or information of

any search made by The Computing Scale Company for Phinney scales, or of any attempt upon the part of said The Computing Scale Company or any of its officers or representatives to suppress any evidence with respect to the prior manufacture of scales embodying cylinders of the type described in Smith Reissue Patent No. 11536.

Affiant was not instructed by The Computing Scale Company to bring to trial the suit against the Toledo Scale Company in the Northern District of Ohio, Western Division, above mentioned.

Affiant, beginning in the year 1910, made a number of visits to the factory of The Computing Scale Company at Dayton, Ohio, with reference to the case involving the De-Vilbiss patent, and at no time was he shown any Phinney scales, or any scales made by any other company embodying a light-weight skeleton cylinder covered with paper or other light material.

Affiant further says that neither he nor any one connected with the firm of Staley & Bowman had any part in the filing or prosecution of the suit brought by The Computing Scale Company in the United States Circuit Court for the Eastern Division of the Northern District of Illinois against the Toledo Scale Company, involving said Smith Reissue Patent No. 11536.

Affiant further says that he learned from Mr. O. O. Ozias that Messrs. Church & Church had brought a suit for The Computing Scale Company upon the Smith Reissue Patent No. 11536, and on November 5, 1906 affiant wrote a letter to Messrs. Church & Church, of which a copy is hereto attached and made a part hereof, marked "Exhibit A", and that affiant a few days later received a reply to said letter from Church & Church under date of November 8, 1906, a true copy of which is hereto attached, marked "Exhibit B."

Affiant further says that his partner Paul A. Staley was undoubtedly the one in closest touch with The Computing Scale Company at or about the time the suit was brought by The Computing Scale Company against the Toledo Scale Company on the Smith Reissue Patent No. 11536, in the Ohio District.

Further affiant saith not.

Border Bowman

Sworn to before me and subscribed in my presence, this 24th day of January, 1922.

Chas. F. Welsh
Notary Public, Clark County, Ohio.

EXHIBIT A

COPY

Nov. 5, 1906

Messrs. Church & Church
Washington, D. C.
Gentlemen:

We have had occasion to go over with Mr. Ozias the Smith patent, reissue number 11536, relating to drum computing scale, and Mr. Ozias advises us that you have brought suit under this patent and that the defendants have taken their testimony in this case. Can you furnish us a copy of the answer in the suit, and also advise us what you think are the probabilities of sustaining the claims 5, 6 and 7 on the construction of the drum? Or, in other words, what are the best references that have been found by the defendants to said claim?

Very truly yours,
Staley & Bowman

EXHIBIT B

COPY

Nov. 8, 1906.

Messrs. Staley & Bowman
Springfield, Ohio
Gentlemen:

Your favor of the 5th inst. received.

The Smith reissue patent No. 11536 is in suit in a case which is now rather dormant. The defendant put up a very vigorous defense indeed and we think the outcome of the suit is doubtful. In the answer the following patents are set up against this re-issue:

G. W. Thompson	78,552	June 2, 1866
W. H. Phinney,	106,869	Aug. 30, 1870
C. S. Lewis,	228,261	June 1, 1880
G. H. Harris,	352,408	Nov. 9, 1886
C. M. Babcock,	421, 805	Feb. 18, 1890
L. F. Kepler,	514,475	Feb. 13, 1894
E. W. Wise,	532,129	Jan. 8, 1895
J. H. Swihart,	539,599	May 21, 1895
S. E. Root,	210,506	Dec. 10, 78
E. & G. A. Walters,	315,095	Apr. 7, 85
J. Scott,	398,002	Feb. 19, 89

English Patents
G. P. Skipworth, No. 888 of 1888
E. W. Wise, No. 678 of 1898

The defendants expert in his testimony referred to the two English patents, and U. S. patents of Thompson, Phinney, Lewis, Harris, Kepler and a patent of Ide No. 272,699. The defendant also set up the prior use of the invention by the following parties at the places named:

William H. Phinney at Pawtucket, R. I.
Daniel H. Horton at Pawtucket, R. I.
John H. Devlin at Pawtucket, R. I.
Wm. H. Raymond at Attelboro, Mass.
Patrick Tierney at Pawtucket, R. I.
Thomas Z. Phinney at Pawtucket, R. I.
Arnold Moffett Jr. at Lonsdale, R. I.
Charles F. Smith at New Britain, Conn.
Landers, Frary & Clark (Corp) at New Britain, Conn.
Hubbard & McClary at Windsor, Vermont
Andrew Turnbull at New Britain, Conn.
William E. Seward at New Britain, Conn.
Rodolphus L. Webb at New Britain Conn.
Samuel R. Munson at New Britain, Conn.

Testimony was taken showing the public use of the Phinney invention but the drum of the Phinney scale seems to have been made invariably of a rather heavy material. The drum itself was made up of veneer or card board and the graduated chart was pasted thereon. The defense is rather a dangerous one.

Yours truly,
Church & Church.

EXHIBIT NO. 8

AFFIDAVIT OF EDWARD RECTOR

Toledo Scale Company, Plaintiff,

vs.

The Computing Scale Company, et al. Defendants.

State of Illinois, County of Cook, ss.

Edward Rector, being first duly sworn deposes, and says as follows:

I am a member of the law firm of Rector, Hibben, Davis & McCauley of Chicago, and have been engaged in the practice of law, specializing in patent matters, for many years. The members of my firm were solicitors for the Toledo Computing Scale Company (later Toledo Scale Company) in cause No. 30,024 in the United States Circuit Court for the Northern District of Illinois, Eastern Division, entitled "The Computing Scale Company vs. Toledo Computing Scale Company", and I am familiar with the proceedings therein.

I have read the answer of the defendant, The Computing Scale Company, in the above entitled cause and the affidavits of Thomas F. Sheridan and Walter A. Scott filed in connection therewith. There are a number of allegations in said answer that are not in accord with the facts, and others which are calculated to give a mistaken impression of the facts if not explained. I shall briefly refer to a number of them.

1. The quoted extracts from defendant's answer in said cause No. 30,024 appearing on page 3 of defendant's answer in present cause are incomplete, as will be seen by reference to the printed copy of said answer at pages 14, 22 and 23 of Volume 1 of the printed record before this court. As there shown the allegations contained in all three of the paragraphs were made "on information and belief." in addition to which a comparison of the last two quoted paragraphs with paragraphs XXIV, XXII of said printed answer will show that they are further incomplete, and that in the original answer a number of patents in addition to the Phinney and Babcock patents were set up (in paragraph XXIV) and that the alleged prior uses set up in paragraph XXII corresponded to such patents. This was in accordance with the conventional practice in the pleadings in patent cases to allege, on information and be-

lief, prior use by each of the inventors whose patents are set up as prior patents, and had no other significance in the present case.

2. The statements in sub-paragraph (b) of paragraph 5 of said answer to the effect that in said cause No. 30,024

> "It appeared from the testimony of the Toledo Computing Scale Company's expert witness, John W. Culver, that the said Phinney scale was not an operable scale, and the said Toledo Computing Scale Company voluntarily chose not to investigate nor to introduce evidence to support its allegation of prior public use and sale."

are not correct. Mr. Culver did not testify that he had ever seen a Phinney scale, or that he had knowledge that any Phinney scales had ever been built. On the contrary his testimony affirmatively shows that he had no knowledge of any such scales. What he testified to was that he built an experimental scale, partly following and partly departing from the Phinney patent, and that it was not successful. His testimony on this point will be found at page 109 of the Printed Record, (Ans. 52-57).

With regard to the allegation above quoted to the effect that "the said Toledo Computing Scale Company voluntarily chose not to investigate not to introduce evidence to support its allegations of prior public use and sale of Phinney scales, the record in said cause shows nothing of the kind, and it was not the fact. The testimony of defendant's witness John D. Burkeholder in said cause, referred to in said answer as supporting such allegation, was simply to the effect that he, Burkeholder, had not personally made "any investigation to find out what had been done along the line of the Phinney patent." (Printed Record, page 317, Answers 27-28). Mr. Burkeholder was the successor of Mr. Allen DeVilbiss as the head of the Patent Department of the defendant company at Toledo, Mr. DeVilbiss having died early in the year 1911. The investigation of the Phinney scales had been made by Mr. DeVilbiss before his death, and Mr. Burkeholder's personal work was particularly directed to the investigation of the other scales referred to in his direct examination (pp. 311-314) and in other parts of his cross-examination (pp. 314-319). Defendant and its counsel believed that the matter of the Phinney scales had been thoroughly investigated by Mr.

DeVilbiss before his death, without result.

The future statement in said sub-paragraph of said answer, to the effect that the defendant "voluntarily elected not to investigate the Phinney scales" is, like the preceding statement, not in accord with the facts. The defendant and its counsel never elected to do anything of the kind, but believed that an investigation had been made by Mr. DeVilbiss as the head of defendant's Patent Department.

3. The statements contained in sub-paragraph (d) of paragraph 5 of said answer to the effect that after an appeal had been taken in said cause No. 30,024.

> "The said Toledo Computing Scale Company entered upon an investigation in regard to the said Phinney scales and discovered the facts which it claims to have discovered and now relies upon in regard to the said Phinney scale and the alleged acts of this Defendant with regard thereto."

are not correct. The Toledo Computing Scale Company did not after said appeal "enter upon an investigation in regard to said Phinney scale" in the sense sought to be conveyed by this allegation of defendant's answer, but learned of the Phinney scales from an attorney who was defending another suit brought by plaintiff on the same patent at Detroit. The facts in this regard are set forth in the affidavit of Mr. Davis and Mr. Pagelsen at pages 970-975 of the Printed Record. After learning from Mr. Pagelsen that there had been some Phinney scales manufactured by the patentee, Phinney, some forty years before, Mr. Davis did then make a trip to Rhode Island to investigate the matter further, as set forth in his affidavit, but until receiving the information from Mr. Pagelsen in the manner set forth neither Mr. Davis nor any other of defendant's counsel had any knowledge of the Phinney scales; and even when Mr. Davis went to Rhode Island and made a thorough investigation he was not able to find any of them still in use.

Moreover, even the investigation made at that time did not develop the facts now relied on by plaintiff in the present cause to show the suppression of evidence by the defendant in the present cause, since it was not discovered or learned at that time, nor until very recently, that the defendant in the present cause had bought up all of the old Phinney scales that were in use, after it had learned of

their existence in connection with its suit at Philadelphia, where a number of them had been introduced in evidence some ten years prior to the date at which the plaintiff in the present case acquired any knowledge of them.

4. The further statements in said sub-paragraph (d) of paragraph 5 of said answer, to the effect that in support of defendant's motion for leave to dismiss so much of its appeal in said cause No. 30,024 as related to reissued patent No. 11536 defendant "in support thereof filed affidavits of newly discovered evidence which are substantially the affidavits filed upon the motion in said Circuit Court of Appeals by the Toledo Computing Scale Company next hereinafter stated", (referring to the motion and affidavit set forth in sub-paragraph (f) following said sub-paragraph (d), and that "on the hearing of said motion the said Toledo Computing Scale Company presented to the said Circuit Court of Appeals three scales which it claimed to have been made and used under the said Phinney patent more than two years prior to the original application for said patent to Albert U. Smith", are not correct. I had personal charge of the motions in question and personally presented them to the Court of Appeals, the first one on January 21, 1913 and the second on May 14, 1913. There were no affidavits filed in support of the first motion, and a number of the affidavits filed in support of the second motion had not been secured at the time the first motion was presented on January 21, 1913, as will be evidenced by the dates of execution of such affidavits (in May, 1913) appearing at pages 975, 979 and 981 of the Printed Record. Nor did defendant present to the Court of Appeals in connection with said motion "three scales which it claimed to have been made and used under the said Phinney patent more, than two years prior to the original application for said patent to Albert U. Smith." I do not believe any samples of Phinney scales were presented or exhibited to the court in connection with said first motion, as it was merely a motion for leave to dismiss one branch of defendant's appeal, and I am certain that three samples of Phinney scales were not presented or exhibited to the court because defendant at that time had possession and knowledge of but one single sample of the old Phinney scales (and a detached indicating drum in addition) which defendant's counsel had borrowed from Mr. Pagelsen, counsel for defendant in the Detroit suit above referred to. Mr. Davis had been unable to secure any other

samples of Phinney scales during his investigation in Rhode Island, as set forth in his affidavit, and had been obliged to ask Mr. Pagelsen to send his single sample to Rhode Island for use and identification in connection with the affidavits which Mr. Davis secured there and which are found in the Printed Record. Nor did defendant have any additional samples of Phinney scales at the time the second motion (which was in fact a printed petition) was presented to the Court of Appeals on May 14, 1913, as set forth in sub-paragraph (f) of paragraph 5 of the said answer. The additional samples of Phinney scales which were introduced in evidence in connection with the depositions taken six or seven years later, in connection with the accounting proceedings and found at page 1297 to 1459 of Volume 3 of the Printed Record, were subsequently discovered during the intervening years.

5. There was no opinion filed by the Court of Appeals in denying defendant's motion in said case No. 30,024 to dismiss so much of its appeal as related to the reissued patent in suit, and I have no recollection whatever of the presiding Judge of the court making any such remarks, in the disposition of the motion, as those attributed to him by Mr. Scott in his affidavit, and as set forth in the said answer as the "opinion" of the court. If any such remarks were made, at any time, I am inclined to think it was on the occasion of the denial of the subsequent motion or petitions, presented on May 14, 1913. The first motion, on January 21, 1913, was merely a motion for leave to dismiss one branch of defendant's appeal, and it was not denied, as I recall the occasion, because of alleged lack of diligence on the part of defendant discovering evidence of the Phinney scales, but because the court was not inclined to permit defendant to dismiss part of its appeal without dismissing its entire appeal. The defendant had been enjoined by the decree of the District Court under two patents, and had taken an appeal as to both. The reissued patent had expired prior to the motion to dismiss so much of the appeal as related to it, but the other patent had not expired, and if defendant had dismissed its entire appeal (which the Court of Appeals would no doubt have permitted) it would have been immediately subject to the injunction under the unexpired patent. Hence its motion for leave to dismiss only so much of its appeal as related to the expired reissued patent and the denial of its motion for the reason above stated. The motion was presented to the Court of Appeals

immediately preceding the argument of the appeal on its merits, and occupied only a few minutes, as I am sure that if any affidavits were exhibited to the court (none were filed) they were not read to the court or taken into consideration.

Nor were the affidavits referred to in sub-paragraph (f) of paragraph 5 of said answer read to or by the court on the subsequent presentation, on May 14, 1913, of defendent's petition to the court to include in its mandate to the District Court permission to entertain and consider an application of the defendant for leave to introduce proofs respecting the Phinney scales. On the contrary, said petition was summarily denied by the presiding Judge of the court upon a mere statement by defendant's counsel of the facts set forth in the affidavit. The presentation of defendant's petition on this occasion, and its denial by the court, did not, as I recall it, consume more than ten or fifteen minutes, and the court did not examine the affidavits nor the sample Phinney scale presented with them. As before stated, defendant had in its possession at this time only the single scale, and the detached indicating drum, which it had borrowed from Mr. Pagelsen, so that the statement of the answer and affidavits to the effect that it presented three Phinney scales to the court on this occasion is a mistake.

6. The statement at the end of sub-paragraph (h) of paragraph 5 of the said answer to the effect that

> both said interlocutory decree of May 16, 1914, and said final decree of March 5, 1919 were rendered long after the alleged discovery of the alleged facts as to said Phinney scales and as to the suppression and secretion of evidence by plaintiff *now relied upon in the bill of complaint in this case.*"

is not correct, nor are the further assertions in said paragraph and in sub-paragraph (j), to the effect that defendant's counsel in said cause No. 30024 urged upon the Court of Appeals the same allegations of fraudulent suppression of evidence by plaintiff in said cause that are now relied on by plaintiff in the present cause. The allegations of wrongful conduct on the part of plaintiff in said cause No. 30024, which were urged upon the court were allegations respecting the suppression and concealment of the plaintiff's knowledge of the existence of the old Phinney scales and the evidence concerning them which was introduced into its suit at Phialdelphia ten years before and because of which said suit

was abandoned. Defendant's counsel had no knowledge at that time, nor at any time prior to the final disposition of said cause No. 30024 by the Court of Appeals, that the plaintiff in that cause (defendant here) had bought up and concealed or destroyed all of the old Phinney scales which had been sold by Phinney and introduced into use and which could be located after the matter of the Phinney scales had been brought to plaintiff's attention by the evidence introduced in the Philadelphia case. As before stated, and as shown in his affidavit, Mr. Davis had been unable to locate a single Phinney scale anywhere in the District in which the Phinney scales had been sold at the time of his investigation in December 1912, but the reason for their disappearance was not known at that time, nor at any time until a date subsequent to the final disposition of said cause by the Court of Appeals. I submit herewith, as Exhibits A and B, copies of appellant's brief filed in the Court of Appeals and its petition and brief filed before the Supreme Court on application for certiorari, which will show exactly what representations were made.

With respect to the further allegations of the said answer, contained in sub-paragraph (v) and (x) of said paragraph 5, to the effect the secretion and suppression of evidence by the plaintiff in said cause No. 30024 now relied upon by plaintiff in the present cause was well known to the present plaintiff on and prior to January 21, 1913, and the 14th day of May, 1913, and that the same were alleged to be shown by the affidavits filed in said Circuit Court of Appeals on said days last stated, the affidavits will of course speak for themselves, and are found at pages 968 to 996 of the Printed Record, an examination of them at which point will show that they contain no allegation or suggestion that the plaintiff in that case had bought up and secreted or destroyed all of the old Phinney scales which it could find in use, and of course no such representation was made to the court by defendant's counsel.

7. With respect to the allegation contained in sub-paragraph (m) of said paragraph 5 of the said answer, to the effect that when the defendant in said cause No. 30024 "did investigate said manufacture and use of Phinney scales (it) had no difficulty whatever in collecting its evidence alleged, and its exhibits of the alleged Phinney scales which in January 21, 1913 it presented to the Circuit Court of Appeals for the Seventh Circuit", the affidavits heretofore referred to, and found in the Printed Re-

cord, show that it did have great difficulty in collecting such evidence and exhibits, and that even after it had learned of the evidence from Mr. Pagelsen and made a thorough investigation it was unable to locate and secure a single sample of the old Phinney scales and had to base its petition to the Court of Appeals solely upon the one which was loaned to it for that purpose by Mr. Pagelsen.

8. I have been engaged in the active practice of patent law for thirty-five years past, and am familiar with the investigations of the prior art usually made in connection with the defense of infringement suits, and I have no hesitation in saying that the plaintiff in the present case (defendant in said cause No. 30,024 went to unusual trouble and expense, and exercised more than ordinary diligence, in its effort to thoroughly develop the prior art relating to the invention of the reissued patent in suit. It so happened that notwithstanding its efforts and its diligence, it failed to discover the old Phinney scales, and in view of the death of Mr. DeVilbiss, who was at the head of defendant's patent department at the time, and had entire charge of the investigation of the prior art, it may not be possible to show exactly why the old Phinney scales were not discovered, but the showing of the record (Printed Rec. Vol 1 pp. 63-124, 238, 320) and particularly the testimony of Mr. Burkeholder (pp. 311-320) respecting the trips he made from the Atlantic to the Pacific, and to numerous intermediate points, in his investigation of the prior art on behalf of the defendant, and his efforts to establish the prior existence of computing scales having lightweight indicator drums, is entirely inconsistent with either a charge of lack of diligence on the part of the defendant or a charge that it had any knowledge of the Phinney scales. Manifestly, if it had acquired any knowledge of the Phinney scales as the result of the earlier investigations which Mr. DeVilbiss had made or was believed to have made, before his death, it would not have gone to the very great trouble and expense which it subsequently incurred in investigating the Milburne and Culmer and Kepler and Wise scales, all of which were very much more remote from the scale of the reissued patent in suit than were the later-discovered Phinney scales.

The defendant had, prior to the submission of said cause to the District Court, caused to be made what it and its counsel believed to be a thorough and exhaustive in-

vestigation of the prior art in all parts of the country, and of all the evidence which it had secured respecting the same was submitted to the District Court on the original hearing. It was not until after the decree of the District Court had been entered, and an appeal therefrom to the court of Appeals had been allowed and perfected, and the cause was pending in the Court of Appeals, that defendant acquired knowledge of the old Phinney scales, in the manner explained in the affidavits found in the printed record and heretofore referred to, whereupon it promptly applied to the Court of Appeals for relief. And even then it acquired no knowledge whatever of the facts now relied upon for relief in the instant case, and no representations respecting any such facts were ever at any time made to the Courts in said cause No. 30024, as will appear from the briefs filed in said cause and heretofore referred to.

(Signed) Edward Rector.

Subscribed and sworn to before me this 25th day of January, 1922.

(Signed) Robert Dobberman.
Notary Public, Cook County, Illinois.

EXHIBIT NO. 9

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,
Complainant,

vs.

Computing Scale Company, et al,
Defendants.

MEMORANDUM OPINION

Killits, J.:

Before the complaint in this case was filed, the court had entered upon the trial of a cause to a jury entitled "The United States v. McDowell," involving a very large amount of testimony. It has occupied the attention of the court in trial already for a period of nearly three weeks, the government not yet approaching the resting of the case. A number of important questions of evidence is raised, yet undecided, and needing the attention and somewhat prolonged investigation by the court. In addition, we have, at such hours as may be occupied without interfering with the progress of the case above named, much important and un-

finished business which cannot be laid aside without serious effect upon the due administration of justice. So far with affidavits filed in this cause since the entry of the order of January 19, the court is presented with records extraordinarily voluminous submitted by the defendant and impossible of fair consideration within a reasonable time. These bear upon the question which the court deems to stand acutely at the threshold of the interlocutory motion, namely, whether or not the issues in this case are not so similar to issues determined in the action recently prosecuted by the principal defendant hereto, the Computing Scale Company, against the complainant, in the courts of the Seventh Circuit, that this court ought not to entertain the interlocutory motion herein for any purpose. The consequence is that the court finds itself unquestionably without any opportunity to give the preliminary contentions of the parties in this case, and particularly that just above referred to, any present fair attention, considering their importance. In addition, the defendant has not yet had time to answer, if it desires to answer, the affidavits referred to, particularly those of Edward Rector, Ira C. Koehne, and Border Bowman, filed January 26, 1922, which the court regards as having particular significance respecting the specially acute matter above referred to.

As noted in the record (order of January 19) the present question arising in this case is upon the motion of the defendant, The Computing Scale Company, to dismiss the application for a preliminary injunction. We are urged that under the provisions of Section 17 of the Act of October, 1914, commonly known as the Clayton Act, the defendant has claims upon the court's attention and for the court's immediate consideration, which are paramount to any other matter before the court except older matters of the same character. The language of the statute is as follows:

> "In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two

day's notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require."

The language of the statute is substantially that of Equity Rule 73. Our view of both statute and rule is that they control the court to the extent only (and within that limitation of course fully) so far as the particular facts, in the exercise of a wise discretion, permit a full compliance therewith consistent with the interests of the parties. We do not believe that either is a hard and fast command that the right to a preliminary injunction must be determined within ten days after the issue of a temporary order, or that the applicant for a preliminary injunction can have no protection after the expiration of ten days if within that time circumstances are such that he was unable to get to the court his case on the interlocutory motion, nor is it a requirement upon an already over-burdened court to pass upon a motion for a preliminary injunction within the limitation, no matter how much labor is involved in due consideration. We feel that the law of either is fully honored if the court requires the applicant to proceed diligently, within the limitation, to the prosecution of his interlocutory motion, and it is clearly within the discretionary power of the court to continue his temporary protection until there can be presented, reasonable diligence being pursued, all the facts bearing upon the proposition, and that, further, the court shall have due opportunity to consider the issues and questions involved. In the case before us, within the ten days, the complainant duly entered upon the presentation of facts supporting the motion for a preliminary injunction, asking for time to present further evidence. The complainant was met by the motion of the defendant to dismiss upon which defendant alone has offered the equivalent of more than three thousand pages of printed record, and we are invited by both parties to consider the numerous affidavits and exhaustive briefs with a large number of citation of authorities. Surely no one ever contemplated that either rule or statute should be applied, as defendant would apply it, to such a situation as this. Attention is called to the last clause of the statute that upon a motion of the opposite party to modify or dissolve the order, "the court or judge shall proceed to hear and determine the motion as expe-

ditiously as the ends of justice may require." We are just now considering such a motion and we propose to do just what the statute advises. But what is "expedition" depends upon the volume of work thrust upon the court to secure a proper determination.

Entertaining the views above set forth, and because of the matters of fact above stated which work compelling reasons therefore, but still endeavoring to be as expeditious as possible, we are entering contemporaneously with the filing of this memorandum an order extending the operation of the temporary restraining order for an additional period of ten days, within which time counsel may complete their presentation of briefs and affidavits bearing upon said motion of the defendant. If the court is unable to dispose of the motion within ten days, we purpose to further extend the period, and we deem it entirely within the court's discretion, if the motion to dismiss should be determined adversely to the defendant, to extend on proper terms the time even beyond ten days, during which the temporary restraining order shall remain in force and within which time plaintiff may complete its proof supporting its demand for a preliminary injunction.

The proof by affidavit already made is sufficiently impressive to suggest that there was no improvidence in the issuing of the temporary restraining order, and the unanswered affidavits filed by plaintiff on the 26th, together with our hasty review of defendant's answer, leaves the court with no present feeling that the motion of defendant to dismiss might be allowed in the exercise of a just discretion. On the facts now appearing, we find stronger ground to justify a temporary restraining order than even in the first instance. It is to the defendant's interest, rather than otherwise, that we should take more time on its motion. We are convinced that in this we are in accord with approved practice. Mississippi Valley Trust Company vs. Railway Steel Spring Co., 258 Fed. 346; Chicago, etc. R. R. v. Callicotte, 267 Fed. 799.

We have before us also a motion by one of the surety company defendants for an increase in the preliminary bond exacted of the plaintiff. That motion will be considered favorably in case the court determines at the expiration of the present extension upon a future extension for any purpose. The complainant also now moves for an order on the defendant requiring it to file in this cause all the exhibits introduced in evidence by the plaintiff (this defendant) in the

case of Computing Scale Company vs. Toledo Scale Company, No. 30024, in the United States District Court for the Northern District of Ohio, Western Division. We deem it unnecessary to pass upon this motion at the present time. We probably shall be inclined to rule favorably upon it should it be determined to proceed further in the hearing of the motion for a preliminary injunction.

John M. Killits,
District Judge.

January 28, 1922.

EXHIBIT NO. 10

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,
Plaintiff,

vs.

The Computing Scale Company, Fidelity and Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company.
Defendants.

ORDER

The court, for reasons set forth in a memorandum filed contemporaneously with this order, directs that the temporary restraining order heretofore granted herein be and the same is continued in full force and effect until and including February 7, 1922.

The defendant, The Computing Scale Company, objects and excepts on the ground that the court has no jurisdiction to grant said order; that the court has no power to make or continue a restraining order herein; that said order is contrary to Equity Rule 73, and said order is contrary to Section 17 of the Act of Congress of October 15, 1914.

John M. Killits,
District Judge.

January 28, 1922.

EXHIBIT NO. 11

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al.,

Defendants.

AFFIDAVIT OF GEORGE R. FRYE

George R. Frye, being first duly sworn, upon his oath says that he is an Attorney-at-Law and that he was from 1914 to 1921 in charge of the Patent Department and of the Experimental Department of the Toledo Scale Company. That he was present in Providence, Rhode Island, in February, 1917, at the time and during the taking of the deposition of Thomas Z. Phinney in Cause Number 30024 then pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled "The Computing Scale Company vs. Toledo Computing Scale Company." That he saw the scales and drum which were then identified by said Thomas Z. Phinney and that same were thereafter in affiant's charge until he severed his former relationship with the Toledo Scale Company. That he is and at all times has been since said scales were produced by said Thomas Z. Phinney familiar with the appearance and marking of same and able to identify the said scales.

Affiant further says that he interviewed the said Thomas Z. Phinney on the 17th day of December, 1921, at Newark, New Jersey, and there dictated for verification by said Thomas Z. Phinney the affidavit of Thomas Z. Phinney, which is attached to and filed with the bill of complaint in the cause now pending in the United States District Court for the Northern District of Ohio, Western Division, entitled "Toledo Scale Company vs. The Computing Scale Company, et al."

Affiant files with this affidavit three scales and a separate drum. Said scales are marked respectively by tags thereto attached

"The Computing Scale Company vs. Toledo Computing Scale Company Eq. Number 30024, Defendants' Providence Exhibit Number 1, George

Farnell, Notary Public."

"The Computing Scale Company vs. Toledo Computing Scale Company Eq. Number 30024, Defendants' Providence Exhibit Number 2, George Farnell, Notary Public."

"The Computing Scale Company vs. Toledo Computing Scale Company, Eq. Number 30024, Defendants' Providence Exhibit Number 3, George Farnell, Notary Public."

and said separate drum is marked by a tag thereto attached

"The Computing Scale Company vs. Toledo Computing Scale Company, Eq. 30024, Defendants' Providence Exhibit Number 4, George Farnell, Notary Public."

Said scale identified as aforesaid as "Providence Exhibit Number 3" also now bears a tag marked "Phinney Exhibit Scale" and said separate drum also bears another tag marked "Phinney Exhibit Original Drum."

Affiant further says that the said three scales and said separate drum marked as foresaid are the three scales and separate drum which were identified by said Thomas Z. Phinney in his deposition taken in February, 1917, as aforesaid, and are the same three scales and drum which the Toledo Scale Company offered in evidence but which the Master and the Court refused to receive in evidence in said cause in the District Court for the Northern District of Illinois, Eastern Division above mentioned.

Affiant further says that said scale bearing the tag maked "Phinney Exhibit Scale" and said drum bearing the tag marked "Phinney Exhibit Original Drum" are respectively the scale and separate drum referred to in the affidavit of Thomas Z. Phinney filed with the bill of complaint in said cause pending in the United States District Court for the Northern District of Ohio, Western Division, above mentioned.

Affiant further says that except that said ezhibits have been somewhat injured through handling since same were produced by said Thomas Z. Phinney in 1917, said exhibits and each of them is identical with and in the same condition as said exhibits as then produced.

Affiant further says that said three scales and said separate drums hereinbefore referred to and described and filed herewith are the same scales and drum and operating rack

which were submitted to Charles W. Owen, of Toledo, Ohio, for examination, and which are described and referred to by said Owen in his affidavit verified on January 19, 1922, and heretofore filed in said cause pending in the United States District Court for the Northern District of Ohio, Western Division.

(Signed) George R. Frye.

Sworn to before me and subscribed in my presence this 6th day of February, 1922.

(Signed) Frank E. Miller,
Notary Public, Lucas County, Ohio.

EXHIBIT NO. 12

In the District Court of the United States for the Northern District of Ohio, Western Division.

October term, A. D. 1921 towit February 7, 1922.

Present: Honorable John M .Killits, U. S. District Judge.

The Toledo Scale Company,

Complainant,

vs.

Computing Scale Company, et al.,

Defendants.

In Equity No. 302.

ORDER

The court finding the same reasons existing set forth in a memorandum filed herein on the 28th of January, 1922, and finding also that the defendants have on this date, being the date when expires the effect of the court's previous order in the premises, filed three affidavits of considerable length which the court has been unable to consider because of previous engagements, and the court being unable because of pressure of pending business entered upon before this case was filed to fully consider the motion of the defendant to dismiss this action for reasons in said defendant's motion given, it is ordered that the temporary restraining order heretofore granted herein be and the same is continued in full force and effect until and including February 13, 1922.

It is further ordered that the parties to this case having further affidavits to be filed previous to the determination of the court on the motion of the defendant to

dismiss, as aforesaid, file said affidavits herein on or before the 10th instant.

The defendant, The Computing Scale Company, objects and excepts on the ground that the court has no jurisdiction to grant said order; that the court has no power to make or continue a restraining order herein; that said order is contrary to Equity Rule 73, and said order is contrary to section 17 of the Act of Congress of October 15, 1914.

John M. Killits, Judge.

EXHIBIT NO. 13

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, of Dayton, Ohio,

Defendant.

AFFIDAVIT OF JAMES A. COFFEY

State of Massachusetts, County of Suffolk, ss.

James A. Coffey having been duly sworn, deposes and says as follows:

That he is of lawful age, a resident of Boston, Massachuetts, that he has been connected with the scale business for many years and was in the years 1909 and 1910 a salesman for the Computing Scale Company of Dayton, Ohio, working out of their Boston office. That while so employed he remembers two old Phinney scales were received at such Boston office from one of the salesmen. He noticed them because of the unusual construction and remembers that they were very similar to the picture shown on the attached circular. At the time he saw them, Mr. O'Neil of the Boston office was packing them for shipment to the factory at Dayton.

The Boston office was then in charge of Mr. D. J. Moynihan.

(Signed) James A. Coffey.

Subscribed and sworn to before me this 25th day of January, 1922.

(Signed) Walter L. Bouve,
(Notary Public)

(Seal)

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Co., et al.,

Defendant.

AFFIDAVIT OF PAUL A. STALEY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of Ohio, County of Clark, ss:

Paul A. Staley, being duly sworn says that he is a member of the firm of Staley & Bowman, attorneys of Springfield, Ohio, giving special attention to patent matters, that the said firm represented the Dayton Computing Scale Company, of Dayton, Ohio, as its counsel in certain matters from about the year 1900 up to the time of its consolidation with other concerns under the name of The Computing Scale Company of America; that affiant participated actively in the organization of The Computing Scale Company of America, which was a consolidation of The Dayton Computing Scale Company, Dayton, Ohio, Moneyweight Scale Company of Chicago, Stimpson Computing Scale Company of Detroit, The Computing Scale Company of Canada, and others which consolidation was effected about the year 1906 and subsequently his firm represented the Computing Scale Company of America until 1910 or 1911.

In 1901 affiant was approached by Mr. Theobald who had purchased The Toledo Scale & Cash Register Company and desired Staley & Bowman to represent them in certain patent matters particularly in connection with their cash register business and in some of his conversations the subject of selling the scale patents to the Dayton Computing Company was mentioned and affiant stated that upon Mr. Theobald's request he would be very glad to conduct negotiations for their sale to the Dayton Company, but nothing was done to this end to affiant's knowledge.

Affiant knows Ira C. Koehne and knows that he represented the Dayton Company in patent matters and affiant had frequent conferences with him and knows that he was intimately connected with the Dayton Company and knew much of its private affairs relating to patents and patent litigation.

Affiant further states that his firm of Staley & Bowman

filed a bill against the Toledo Computing Scale Company under the Smith reissue patent No. 11536; that this suit was not pressed and was finally dismissed, as affiant remembers, upon orders received from the general counsel of the Computing Scale Company of America in Chicago. Affiant at present has no recollection that he was ever informed by any officer or other person representing the Dayton Computing Scale Company or the Computing Scale Company of America concerning scales which had been manufactured and known as the Phinney scales or that any depositions concerning their use had been filed in previous suits. Affiant further states that he made numerous visits to the factory of the Dayton Computing Scales Company or of the Computing Scale Company of America located at Dayton between the years 1907 and 1911 and he has at this present time no recollection of having seen any finished Phinney scales at the factory and does not at the present time recall that the manufacture of scales under the Phinney patent was discussed.

Affiant might state that he personally did not have a great deal of confidence in the Smith reissue patent in view of what he regarded as the attitude of the Federal Courts towards patents with a narrow margin of invention, which attitude seems to have been somewhat changed in recent years.

(Signed) Paul E. Staley.

Subscribed and sworn to before me this 17th day of January, 1922.

(Signed) Chas. I. Welch,
Notary Public.

(Seal)

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,
Plaintiff,

vs.

The Computing Scale Company,
Defendant.

AFFIDAVIT OF WALTER F. STIMSON

State of Ohio, Lucas County, ss.

Walter F. Stimson, being first duly sworn, upon his oath says that he is a resident of Louisville, Kentucky, and is Vice-President of the Stimpson Computing Scale Company, which is and has been since early in the year 1919

engaged in the manufacture and sale of automatic computing scales in Louisville, Kentucky. Said company is in no way connected with The Computing Scale Company of Dayton, Ohio, or with Toledo Scale Company, but is a competitor of both of said companies; and affiant since 1914 has had no connection with The Computing Scale Company or with any of the companies associated or affiliated with it.

Affiant's first connection with the computing scale business was in the year 1893, when he in March of that year prepared drawings for a computing scale, and in March, April and May of that year constructed a scale in accordance with his invention. Said scale was a computing beam type scale, not entirely automatic, requiring one manual operation. Prior to said time The Computing Scale Company of Dayton, Ohio, had been and then was manufacturing a computing scale of the movable fulcrum pivot type, which required four manual operations and because of its greater number of manual operations was greatly inferior to the scale invented by affiant.

Affiant filed an application for letters patent in the U. S. patent office, covering his said invention, and U. S. Letters Patent were issued to him thereon in July of 1895.

In April, 1894, affiant and others formed a limited copartnership under the laws of Michigan, located at Milan, Michigan, for the purpose of exploiting said scale; and in the month of July, 1894, affiant made a trip to Saline, Michigan, Manchester, Michigan, and Tecumseh, Michigan, for the purpose of obtaining orders for said scales when same should be ready for delivery. Affiant took with him upon said trip his model scale, and was successful in selling a number of said machines in said towns. In January or February of 1895 the scales manufactured in accordance with affiant's invention were ready for delivery to the persons to whom they had been sold in said towns, and same were delivered, with the exception of one, the purchaser of which declined to take it for the reason that he had in the meantime been persuaded by a representative of The Computing Scale Company of Dayton to cancel the order and purchase a Dayton Computing Scale in place of it; and it is affiant's information and belief that a samilar effort had been made by the representatives of The Computing Scale Company of Dayton to induce the other purchasers of affiant's scale to cancel their orders therefor, but without success except in one instance.

In September or October, 1894, The Computing Scale Company sent to all or substantially all of the residents of Milan, Michigan, where affiant and his co-partners in said co-partnership were residing and had their main office and where was situated the bank with which they did business and in which affiant's co-partners were interested, a postal card stating in substance that The Computing Scale Company of Dayton, Ohio, were the pioneers in the manufacture of computing scales and that any one purchasing a computing scale from others would be liable for infringement of the patents owned or controlled by the said The Computing Scale Company of Dayton. The effect of said postal card was to frighten affiant's partners, who were inexperienced in patent matters, and to increase affiant's difficulties in carrying out his plant to enter upon the manufacture and sale of the scale invented by him.

About a week or ten days after flooding Milan with said postal cards, O. O. Ozias, the manager of The Computing Scale Company of Dayton, came to Milan and sought an interview with affiant's co-partners and saw them first without affiant being present. Affiant happened to learn from a clerk in a store that Ozias was closeted with affiant's co-partners, and affiant thereupon joined the meeting. During said interview said O. O. Ozias claimed that affiant's invention and patent constituted an infringement of a certain patents known as the Gamble and Allen patent, (Original Number 489942) which patent Ozias claimed The Computing Scale Company of Dayton owned or controlled; but which claim affiant was subsequently informed was untrue at that time. Said Ozias threatened affiant and his co-partners and any purchasers of affiant's scale with suits to be brought by said The Computing Scale Company of Dayton upon said Gamble and Allen patent; in fact, went so far as to say that he "liked a law suit better than a meal of vituals." Said Ozias related how he had caused the fast Wabash train to stop at Milan, which was not a regular stop, and sought in many ways to impress upon affant and his co-opartners his own importance and the power, influence and magnitude of The Computing Scale Company of Dayton; all of which had the effect, as was its clear design, of intimidating the inexperienced members of affiant's co-partnership. The capital of said co-partnership at that time consisted of Fifteen Hundred Dollars ($1500.00) in cash, against which affiant had put in his patent; and more money in considerable amounts was re-

quired before the business of manufacturing said scale could be begun; and the tactics of said Ozias made it very difficult to raise the additional funds.

Notwithstanding the intimidating methods used by The Computing Scale Company against affiant and his co-partners, as hereinbefore related, they proceeded with their plans, first obtaining an opinion, based upon an exhaustive examination of the records of the Patent Office, from their patent counsel, Mr. James Whittemore of Detroit, Michigan, to the effect that affiant's patent was not an infringement of the Gamble and Allen patent.

Affiant and his co-partners started the manufacture of affiant's scale in Tecumseh, Michigan, late in the year 1894. At no very great length of time after the manufacture and sale of affiant's scale had been begun, the exact time not being now within affiant's recollection, The Computing Scale Company of Dayton began to harass and annoy affiant and his co-partners by circularizing their customers and prospective customers with respect to the alleged infringement by affiant of patents claimed to be owned by The Computing Scale Company of Dayton, and by interviewing persons who had bought affiant's scales, endeavoring and in some instances succeeding in inducing them to cancel their orders and, as affiant was informed by his customers and associates, in many instances giving such customers agreements by which The Computing Scale Company of Dayton agreed to indemnify and save harmless such customers against any claims which might be asserted by affiant and his co-partners by reason of cancellation of orders for affiant's scales.

Affiant's original patent on his invention was issued in July, 1895. In the following month, or August O. O. Ozias made application to the U. S. Patent Office for a patent on a computing scale which embodied the important feature of affiant's invention; and through this application for patent by said O. O. Ozias the Patent Office in December was asked to declare an interference against affiant, said Ozias claiming priority of invention in that, as said Ozias claimed, he had invented the said scale for which he was applying for patent in the early part of the year 1892.

Testimony was taken in said interference proceeding and a number of witnesses were called in behalf of said O. O. Ozias, for the purpose of establishing that the scale which he claimed to have invented had been made under his direction in the early part of the year 1892, by a man then employed by The Computing Scale Company of Day-

ton, whose name was McCall. Said McCall was not called as a witness by said O. O. Ozias, and affiant was informed and believes that said O. O. Ozias and his associates in The Computing Scale Company of Dayton believed that said McCall had gone to Ireland at the time said interference proceeding was begun, and that in consequence he would not be available as a witness; and affiant believes that it was for that reason that said Ozias claimed that McCall was the man who had constructed the scale for him. Said O. O. Ozias testified in substance that after said scale had been made by said McCall under Ozias' instructions, it had been secretly kept in the desk of Edward Canby, the president of The Computing Scale Company for a year and a half or more; such evidence being necessary in order to show that said alleged invention was kept secret from the public until within less than two years prior to the time said Ozias filed his application. Said Canby, however, did not testify in said interference proceeding, and affiant and his associates were able to find McCall in this country and to produce him as a witness; and he testified in substance that he had never seen the scale before it was exhibited to him on the witness stand; and affiant and his associates were also able to find the man who had actually built the scale for Ozias, whose name was William H. Sanderson, and who testified that he had constructed it in the Fall of 1893, which was about six months subsequent to the time affiant invented and constructed his scale. The final result of said interference proceeding in which said testimony was introduced was in favor of the priority of affiant's invention. Said entire proceeding was based by said Ozias upon claims which he knew to be untrue and was a part of the campaign of The Computing Scale Company to destroy the business of affiant and his associates and to eliminate them as competitors in the scale business. The said unfounded proceeding cost affiant and his associates approximately Five Thousand Dollars ($5,000.00) to defeat, which in itself was a matter of serious consequence to them in those days.

In the spring of 1895 the co-partnership above mentioned was reorganized into a corporation under the laws of Michigan, having a capital of Ffteen Thousand Dollars ($15,000.00), and affiant's patent was turned back to him and he entered into a royalty contract with said corporation. The name of said corporation was the Stimpson Computing Scale Company. In the Spring or Summer of 1896 a corporation was formed under the laws of the state

of Indiana, under the name of the Stimpson Computing Scale Company, which had its headquarters at Elkhart, Indiana, and said company took over the assets of the Stimpson Computing Scale Company organized under the laws of Michigan and assumed the royalty contract which affiant had had with the Michigan corporation. Said Stimpson Computing Scale Company, the Indiana corporation, continued in business under that name until the year 1912, when its name was changed to the Detroit Automatic Scale Company. Affiant's relations with the Indiana corporation continued until the cancellation of his contract with them, which became effective September 7, 1899, under six months' notice theretofore given, pursuant to the terms of the contract. During all of said period up to September 7, 1899, said Stimpson Computing Scale Company, the Indiana corporation, and its predecessor, the Michigan corporation, and the customers of said two corporations were harassed and annoyed by a number of suits brought by The Computing Scale Company of Dayton, asserting infringements by said companies and their customers using their scales, of various patents which The Computing Scale Company claimed to own or control. Both of the Stimpson Computing Scale Companies were successful in defending all of the said actions which were brought against them or against their customers. In no case did The Computing Scale Company of Dayton sustain any claim which it asserted against either of said companies or any of their customers. It was and is affiant's belief that said suits were caused to be instituted by the officers of The Computing Scale Company of Dayton solely for the purpose of annoying and harrassing the Stimpson Computing Scale Companies and their customers and of imposing expense upon the Stimpson Computing Scale Companies; all in the effort to drive said companies out of the scale business and to eliminate their competition.

The correspondence which took place between the Stimpson Computing Scale Company and this affiant at about the time that company terminated affiant's contract with it and in connection with the termination evidence the effect which the practices of The Computing Scale Company of Dayton had had upon the Stimpson Computing Scale Company's business. In a letter dated February 13, 1899, received by affiant from the Stimpson Computing Scale Company, it was stated, among other things:

"We are at the present time confronted by a most serious condition of affairs. Four years of hard work and, in addition, our money invested, from all of which we have never received even a sufficient compensation to support our families. Not one dollar has any one but yourself and the attorneys we have employed ever received to pay for our efforts, and we assure you that this condition brings many gloomy hours to the managers of this company. And we are now seriously considering the abandoning of the scale business, as we cannot persist in longer wasting both time and opportunities."

In a letter received by affiant from the Stimpson Computing Scale Company, dated February 20, 1899, bearing the initial "F", indicating that it had been written by Mr. Edwin Finn, the general manager of the Stimpson Computing Scale Company, it was stated among other things:

"To explain our condition, as you request, we cannot do better than to briefly detail the conditions now confronting us.

"It has been clearly evident to any one interested that the Dayton people, notwithstanding their repeated defeats in the courts, have grown bolder and bolder; from mutterings and threats they have advanced step by step until within the past three months theseforerunners of evil have developed in the bringing of the Houssong suit and the placing upon the market of a chart scale, which latter is to all intents and purposes a Stimpson scale * * * * Ordinary competition, we would invite rather than destroy; but a scale of this kind in the hands of these people is not ordinary or legitimate competition, but an engine of destruction, so far as our business is concerned, if it cannot be overcome in some manner, and that at once, as they are flooding the market with enclosed circulars, as well as notices of our infringement of their patents, etc., etc.

"If our attorneys' final decision shall be that your patents are not sufficiently broad to justify proceedings against them with a reasonable hope of ultimate success, it would be the height of folly for this company to undertake to proceed with the business under existing conditions, knowing only too well how

they have harassed and crippled us when they did not have present seeming advantage."

In a letter signed by the Stimpson Computing Scale Company under date of March 6, 1899, addressed to affiant, dictated by "E. F.", meaning Edwin Finn, it was stated in part:

> "After careful consideration of existing conditions, it is the decision of this company that the difficulties and perplexities encountered during the years that we have been in the scale business have not only been of a very unpleasant character, but unprofitable as well; and the recent placing of a chart scale upon the market by The Computing Scale Compony of Dayton would seem to destroy any hope of future success or business pleasure.
>
> "The last move of our competitors seems well calculated to prove our undoing, as we are forced to pay royalty for the privilege of manufacturing an article whilst our competitors can manufacture a similar article without royalty. Were this the only bad feature, it might possibly be overcome; but when in connection with this you consider that we are forced to market our product at great expense, much of which expense can be directly charged to the upbuilding of trade, whilst our competitors use their product simply as a means of belitting our efforts and annoying our customers, offering their scales for less than one-half price, or in fact, any manner best calculated to injure or destroy our business."

Affiant further says that said statements hereinbefore quoted from said letters of said the Stimpson Computing Scale Company to him with respect to the activities of The Computing Scale Company of Dayton, Ohio, and its effect upon the business of the Stimpson Computing Scale Company were true.

Affiant further says that among the representatives and agents of The Computing Scale Company who were particularly active in carrying on the campaign against the Stimpson Computing Scale Company, both the Michigan corporation and the Indiana corporation, were O. O. Ozias and Ira C. Koehne.

After affiant's contract with the said the Stimpson Computing Scale Company, the Indiana Corporation, was

terminated, he and others in the latter part of the year 1899 organized the W. F. Stimpson Company, a corporation under the laws of Michigan, which engaged in the manufacture of the scale invented by affiant, at Detroit, and which after some litigation with the Stimpson Computing Scale Company with respect to the right to use the name "Stimpson," in which affiant's new corporation prevailed, the stock of the Stimpson Computing Scale Company was acquired by the persons who were affiant's associates in the W. F. Stimpson Company; and shortly thereafter both of said companies, together with The Computing Scale Company of Dayton, The Moneyweight Scale Company and The Moneyweight Scale Company, a Canadian corporation, became subsidiary corporations of The Computing Scale Company of America.

Affiant received royalties on his patents from the Stimpson Computing Scale Company, the Indiana corporation, and from W. F. Stimpson Company, until the year 1914. He was general manager of the W. F. Stimpson Company during the year 1900 and was in charge of its experimental department and work during the year 1901. After 1901 his only connection with said company was the royalty contract above mentioned.

About the year 1910 Toledo Computing Scale Company obtained an injunction against The Moneyweight Scale Company, the sales corporation of The Computing Scale Company of Dayton, restraining the Dayton Company from infringing a certain patent owned by the Toledo Company, covering a so-called "fan computing scale." Said infringing scale had been made by The Computing Scale Company at its Dayton factory. After the issuance of said injunction, affiant was asked by the then manager of the W. F. Stimpson Company and the Stimpson Computing Scale Company, both of which were at that time subsidiary corporations with The Computing Scale Company of Dayton of The Computing Scale Company of America, to evolve some method of voiding the effect of said injunction; and affiant thereupon worked out and patented a device which enabled the said companies to build a fan scale which did not infringe said patent of the Toledo Scale Company. Said fan scale so invented by affiant was manufactured by the W. F. Stimpson Company and sold by the Stimpson Computing Scale Company, for a short time; then the manufacture of that type of scale was discontinued and the W. F. Stimpson

Company then proceeded to manufacture the same type of fan scale which The Computing Scale Company of Dayton had been enjoined from manufacturing, in said suits brought by Toledo Scale Company, and said scale was sold by the Stimpson Computing Scale Company. Both of said companies and The Computing Scale Company of Dayton were then under the same control and certain persons, as affiant now recalls, Edward Canby, Samuel Hastings and George M. Ludlow were directors of The Computing Scale Company of Dayton and also of the W. F. Stimpson Company and the Stimpson Computing Scale Company.

In November or December of 1920 affiant's present corporation, the Stimpson Computing Scale Company, a Kentucky corporation, established an office in Detroit, Michigan and requested the Postmaster of Detroit to deliver to it all mail directed to the Stimpson Computing Scale Company, Detroit. Notwithstanding the fact that the name of the Stimpson Computing Scale Company, the Indiana corporation, was changed in 1912 to Detroit Automatic Scale Company, the latter company declined to consent to the delivery to the Stimpson Computing Scale Company, the Kentucky corporation, of mail addressed to the Stimpson Computing Scale Company, Detroit, and insisted and still insists that all mail so directed shall be delivered to it; with the result that all mail which is directed to Stimpson Computing Scale Company, Detroit, Michigan, without any street address has been and is now being delivered to the Detroit Automatic Scale Company, now at Dayton, Ohio, where it has been located since September 1st or thereabouts, 1921. Said Detroit Antomatic Scale Company claims the technical right to receive such mail because of the fact that its name was formerly Stimpson Computing Scale Company; but said claim is a mere technicality, for it has had no right to use the name Stimpson in connection with its business since September, 1914, and has not used the name Stimpson as a part of its corporate name for nearly ten years. The effect of the receipt of such mail by said Detroit Automatic Scale Company to divert business from the Stimpson Computing Scale Company, affiant's present corporation, to the Detroit Automatic Scale Company or to The Computing Scale Company of Dayton, with which it now has its office, and thus to interfere with the competition

offered to said Dayton companies by affiant's present corporation.

Further affiant saith not.

(Signed) Walter F. Stimpson.

Sworn to before me and subscribed in my presence, this 9th day of February, 1922.

(Signed) Frank E. Miller,
Notary Public, Lucas County, Ohio.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,
Plaintiff,

vs.

The Computing Scale Company, et al.,
Defendant.

AFFIDAVIT OF DANIEL MYERS

In Equity No.....

Daniel Myers, having been sworn, deposes and says: That he is of lawful age and resides at Whitehall Hotels, Cleveland, Ohio; that he was for many years President of The National Computing Scale Company, and as such was thoroughly conversant with the business done by The National Computing Scale Company, and of the many and devious attacks made upon it by The Computing Scale Company of Dayton, Ohio; that he has read the affidavit this day executed by George B. Hoyt in the above entitled case, and that with that part thereof referring to The National Computing Scale Company and of the campaign conducted against it by The Computing Scale Company he agrees perfectly, and states that he believes all of such statements made by said George B. Hoyt are true, and that because of the long-continued attacks by The Computing Scale Company of Dayton, The National Computing Scale Company was forced to go into the hands of a receiver.

Daniel Myers.

Subscribed and sworn to before me, a Notary Public, this 9th day of February, 1922.

Godfrey Holmes,
Notary Public.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al.,

Defendant.

In Equity No.....

AFFIDAVIT OF GEORGE B. HOYT

George B. Hoyt, having been sworn, deposes and says: That he is lawful age and resides at 2237 Cummington Road, Cleveland, Ohio; that he was for many years a member of Hoyt & Co., sales agents for the Computing Scale Company of Dayton, Ohio, having as their territory ten states, including Ohio, Indiana, Kentucky and Michigan, that while in such position he was informed of the methods employed by The Computing Scale Company to eliminate competition and of their purpose to dominate and control the computing scale business of the United States; that he was instructed by Edward Canby and Orange O. Ozias, then President and General Manager respectively of The Computing Scale Company to assist several of their so-called "knockout gangs" in trips thru said territory, and they severally criticised him for refusing to take part in such methods; that the mission of such "knockout gangs" was to visit all merchants using scales of any competitive make and denounce the competitive scales to such merchants, advising them to return the competitive scales to their makers, to refuse to pay any balance that might be due thereon, and to break any contract of purchase that might exist, threatening such merchants with lawsuits and physical violence if they did not repudiate such contracts, and in many cases actually starting fist fights with such merchants and their employees; that they offered to take over the competitive scale in exchange for a scale made by The Computing Scale Company at greatly reduced prices and in many cases without any additional payment despite the fact that the list price of the scale given to the merchant was much greater than that of he competitive scale; that they tried in many ways to intimidate the salesmen of the competitive scales, threatening him with bodily injury, lawsuits, and the like, and placing obstacles in his path to prevent him collecting moneys due on scales he had previously sold.

Affiant further says that the lack of co-operation of Hoyt & Co., in these and other objectionable competitive methods was made one of the reasons for the breaking of their sales agency contract by The Computing Scale Company.

That thereafter affiant, together with several associates, interested a small amount of capital in Cleveland, Ohio, and New York, to finance a company to place on the market a new and patented scale materially differing from those then being sold. Such new company was given the name of The National Computing Scale Company, and its factory and principal offices were established at Cleveland, Ohio, affiant being at various times Secretary and Treasurer. The product of the new scale company was favorably received by the merchants generally throughout the country, and the company was enjoying a prosperous business until such time as The Computing Scale Company of Dayton concentrated their "knockout gangs" and other similar methods of competition against it, and that ever after The National Computing Scale Company was made the target of The Computing Scale Company, the sale of the new scale was sufficient to enable it to weather the fight for upwards of five years, until finally the unwarranted and unnecessary expenses consumed in legal fees, traveling, furnishing indemnity bonds to customers and agents, etc., and the time spent by the officers of The National Company to fight the manifold attacks of The Computing Scale Company had devoured the limited finances of The National Computing Scale Company, and they were forced to discontinue the manufacture and sale of their new scale.

Affiant further says that among the methods employed by The Computing Scale Company of Dayton to plague and pester The National Computing Scale Company were:

1. The use of "knockout gangs" as above referred to, who threatened and intimidated customers and agents throughout the country.

2. The bringing of suits against many customers in remote and widely separated parts of the country, which suits were delayed and postponed as long as possible and then allowed to abandon.

3. The advertising of such suits by wide dissemination of literature to merchants and agents in all parts of the country, the advertisements often being deceptively worded to convey the impression that such suits had already been won by The Computing Scale Company.

4. The bringing of suits against The National Computing Scale Company for alleged infringement of patents, which suits were also widely advertised and then allowed to drag along in the courts as long as possible.

5. The manufacture of scales closely resembling those being sold by The National Computing Scale Company and offering them to the merchants and public at a price much lower than the selling price of the National Scales.

6. The false labeling of such "knocker" scales with an alleged patent marking tending to show invention prior to the dates of the patents under which the National Scale was then being manufactured. Affiant himself brought suit at Cincinnati, Ohio, as informer for the Government for such false patent labeling, and within two weeks the false labels were taken off of the scales, whereupon the suit was dropped by the Government against affiant's protest.

7. The solicitation of the National Company's agents to leave the National and enter the employ of The Computing Scale Company, offering to buy all commission or other accounts due them periodically from The National Scale Company and to pay the agent in cash therefor.

And in devious other ways designed to annoy, harm or cripple the business and good will of The National Scale Company, until finally the National Computing Scale Company was financially unable to weather their manifold attacks and were forced into the hands of a receiver.

George B. Hoyt.

Subscribed and sworn to before me, a Notary Public, this 9th day of February, 1922.

G.F.Osborn,
Notary Public.

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al.,

Defendants.

AFFIDAVIT OF IRA CHASE KOEHNE

State of Ohio, Lucas County, ss.

Ira Chase Koehne, being first duly sworn upon his oath, says that he has read the affidavits of Edward Canby,

Samuel Hastings and George M. Ludlow, filed in the above entitled cause, and that notwithtsanding the statements contained in said affidavits contradicting certain statements in affiant's former affidavits filed herein and asserting that certain statements made by affiant in his former affidavits are untrue, that said statements so made by affiant in his former affidavit and each of them are true.

Affiant further says that neither said Edward Canby, said Samuel Hastings, nor said George M. Ludlow took the active part in that portion of the affairs of the Computing Scale Company dealt with in affiant's former affidavit that was taken by affiant and by O. O. Ozias; that said Edward Canby was, however, familiar with said matters to the extent stated in affiant's former affidavit although some of the transactions and activities of said company in connection with its attempts to suppress competition were not made known to said Canby by Ozias or by this affiant, affiant keeping silent with respect to same by order of said Ozias. Said Canby, however, was familiar with the fact that said company was, during all of the time of affiant's connection with it, engaged in a campaign to suppress competition to eliminate its competitors from the field, and said Canby also knew of the fact that said company had brought suits against The Federal Scale Company and against Randall in the United States Circuit Court at Philadelphia, and knew that in said suit against The Federal Scale Company testimony had been taken by the defendant showing the prior use of the Phinney scale for nearly twenty years before the Smith original application was filed in the United States Patent Office, and said Canby knew that in said suit the Federal Scale Company had produced three of said Phinney scales so made and used. Affiant knows that said Canby had knowledge of said facts because of the fact that affiant and said Ozias discussed said matters with said Canby, and because affiant knows that said Canby and said Ozias took at least one trip east in connection with the prosecution of said suit against the Federal Scale Company.

Before making his former affidavits herein affiant had carefully reflected upon the matters therein discussed and had to some extent refreshed his recollection from an examination of papers in his possession. Since said affidavit was prepared affiant has made a further examination of papers in his possession and has found a number of papers which were either a part of his personal correspondence or became a part of his personal files by reason of their being turned

over to him by the Computing Scale Company while he was associated with it.

Affiant attaches hereto certain copies of said papers, which are now in his possession, marked Exhibits 1 to 8, and makes same a part hereof.

Exhibit No. 1 is a photostatic copy of a receipt given by the Computing Scale Company to affiant on or about June 17, 1905, which said receipt is in affiant's handwriting and the signatures thereon are in the handwriting of the said Edward Canby. The occasion for the giving of said receipt to affiant was that on or about said date affiant's employment upon an annual basis by the Computing Scale Company was terminated; according to the books of the Computing Scale Company affiant had been overpaid upon a certain one of his royalty accounts so that apparently affiant was then indebted to the Computing Scale Company on this account. In fact, however, this account was one which was used by the Computing Scale Company as a subterfuge, by means of which it supplied affiant with money to be used in carrying on its campaign with respect to suppression of competition, without having the true nature of such expenditures appear upon its books. Affiant had not in fact been overpaid upon any royalty account, but had received and expended the moneys which were charged to him in the royalty account aforesaid in the efforts of the Computing Scale Company to suppress competition, and for his own protection required the Computing Scale Company to give him the receipt, of which Exhibit 1 is a copy, at the time his employment upon the annual compensation basis was terminated as aforesaid. Said Edward Canby was fully aware of the foregoing facts with respect to the character of said account and as to why said receipt was demanded by affiant, and knew that affiant did not make any payment to the Computing Scale Company for or in connection with said receipt.

Exhibit No. 2 is a photostatic copy of a letter received by affiant within a day or two after September 11, 1895. The signature "O. O. Ozias" upon the original of said exhibit is in the handwriting of Orange O. Ozias, the manager of the Computing Scale Company. The ''knock-out' business in Terre Haute" referred to by said Ozias was the activity of affiant under the directions of said Ozias in endeavoring to suppress the competition of Keystone Store Service Company of Beaver Falls, Pa., said company

being then one of the competitors of the Computing Scale Company.

Exhibit No. 3 is a photostatic copy of a statement rendered by F. E. Mellinger, Superintendent of the factory of the Computing Scale Company, on or about Aug. 23, 1895, showing expense incurred and charged to the Experimental Department during the period from May 1, 1895, to August 17, 1895. The item on said exhibit entitled "No. 2 Beaver Falls Knocker" refers to a scale known as a knocker scale manufactured for the purpose of attempting to eliminate the competition of the scale made by the Keystone Store Service Company of Beaver Falls, Pa.

Exhibit No. 4 is a photostatic copy of a circular issued and widely distributed by the Computing Scale Company prior to August 10, 1895. Said circular was put out with the knowledge and by the authority of Edward Canby, President, and O. O. Ozias, General Manager, of the Computing Scale Company, and was put out as a part of the campaign then being conducted by the Computing Scale Company to eliminate the Keystone Store Service Company, a competitor.

Exhibit Nos. 5, 5-a, 5-b and 5-c hereto attached are photostatic copies of the four pages of a letter received by the Computing Scale Company on or about August 11th, or 12th, 1895, from John R. Bennett, then the counsel for the Keystone Store Service Company, then one of the leading patent attorneys of the United States, now deceased. The statements contained in said letter as to what the Compuing Scale Company had been doing in the way of attacking the Keystone Store Service Company and the scales made by that company were all true.

Exhibit No. 6 hereto attached is a photographic copy of another letter received by the Computing Scale Company from said John R. Bennett about August 11th or 12th, 1895. It is true, as stated in substance in said letter, that prior to said time the Computing Scale Company had sent instructions to its agents that they should state that if their customers preferred the Culmer scale the Computing Scale Company would furnish it at one-half the Culmer price, and that the Computing Scale Company had further instructed its agents "you will be expected out of loyalty to do this without any commission or profit, and in this way discourage and drive out Culmer's salesmen."

Exhibit No. 7 is a photostatic copy of an article which

appeared in the newspaper published in Huntington, Indiana, shortly prior to July 28, 1896. The article referred to by said Huntington newspaper had in fact been published at Fort Wayne, Indiana, and said article had been published at the request of the Computing Scale Company acting by affiant under direction of O. O. Ozias and Edward Canby as a part of the compaign of the Computing Scale Company to suppress the competition offered by the Keystone Store Service Company.

The activities of the Computing Scale Company against the Keystone Store Service Company had driven it out of business at Beaver Falls, Pa., and the article published by the Fort Wayne Sentinel aforesaid served its purpose, which was to keep the Keystone Store Service Company from obtaining a new start in Huntington, Indiana, as it proposed to do after being eliminated at Beaver Falls. The Fort Wayne Sentinel containing the article attacking the Keystone Store Service Company was sent to every person listed in the City and County Directory in the City of Huntington, Indiana, and Huntington County in which said city is located, at the request and expense of the Computing Scale Company for the purpose of creating sentiment against said Keystone Service Company and interfering with the sale of its stock.

Exhibit Nos. 8 and 8-a are photostatic copies of two sheets of a letter written and mailed by affiant to the Computing Scale Company on or about July 16, 1896, and deal with certain activities of affiant in connection with the campaign of the Computing Scale Company to eliminate and suppress the competition of the Stimpson Computing Scale Company, which company was then a competitor of the Computing Scale Company. "The regular Stimpson letter" referred to in said letter was a form of letter which had been prepared by O. O. Ozias and affiant with the knowledge and applоval of Edward Canby to be sent to the users or prspective users of Stimpson scales. Affiant has not thus far found among his papers one of said letters, but it wa a letter designed to prevent purchase and use of the Stimpson scale through threats of suits and otherwise.

Affiant further says that the tactics which were used against the Keystone Store Service Company and the Stimpson Company, as partially set forth and shown by the Exhibits hereto attached, were in addition to other devices and means of eliminating competition used against other

companies; and as a result of the numerous campaigns of the Computing Scale Company to eliminate competitors the Keystone Store Service Company, The National Computing Scale Company, The Stimpson Computing Scale Company of Milan, Michigan, and The Stimpson Computing Scale Company of Elkhart, Indiana, The Automatic Scale Company of Washington, D. C., and the Federal Scale Company were forced out of business.

Affiant further says that the same tactics which were used against said companies which were forced out of business were, under the authority and by the direction of said Edward Canby and O. O. Ozias, used by affiant and others against the Toledo Scale Company for the purpose of endeavoring to force that company out of business. During the period of affiant's connection with it said The Computing Scale Company was involved or engaged in the prosecution or defense of thousands of lawsuits brought in pursuance of or resulting from its attempts to eliminate competition.

Affiant further says that he was familiar with relations between the Moneyweight Scale Company and the Computing Scale Company, and that the claim made in the affidavits filed by the Computing Scale Company herein to the effect that the Computing Scale Company had no salesmen in New England is true only in the most technical sense, the fact being that the Moneyweight Scale Company was at all times under the control of the same persons who controlled the Computing Scale Company, and the Moneyweight Scale Company, its officers and salesmen were actively engaged in the aforesaid campaign to suppress competition of others with the scales manufactured by the Computing Scale Company.

Further affiant saith not.

(Signed) Ira Chase Koehne.

Sworn to before me and subscribed in my presence this 9th day of February, 1922.

Frank R. Miller,
Notary Public, Lucas County, Ohio.

EXHIBIT NO. 1

The Computing Scale Co.
Dayton, O., U. S. A., June 17th, 1905.

We hereby acknowledge receipt in full for every claim and demand of every nature and description that may exist in favor of The Computing Scale Company and Edward Canby or either of them against Ira C. Koehne to date.

The Computing Scale Co.,
E. Canby.

EXHIBIT NO. 2

Capital $160,000.00
The Computing Scale Co.,
E. Canby, President O. O. Ozias, Genl. Manager
Dayton, O., U. S. A., Sept. 11th, 1895.

(K. A. S.)
Mr. Ira C. Koehne,
Terre Haute, Ind., Terre Haute Hotel.
Dear Sir:

We have your several letters. Note with interest your progress in the "knock out" business in Terre Haute.

We hope you will be successful today in this special work of showing up the two sample scales which were shipped you by express today.

It is all right for you to go to Sullivan and other places noted in your letter, if you think it wise to do so. We hope, however, that you may be able to return to Dayton by the end of the week.

Respectfully,
The Computing Scale Co.
O. O. Ozias, Manager.

EXHIBIT NO. 3

Office Experimental

Dayton, Aug. 23rd, '95.

Statement of Work Material and Tools for Koehne's Scales:

No. 1 Spring balance—	
Labor construction	$116.55
Material	9.87
Wood pattern furnished by Halteman	39.20
	$165.62
No. 2 Beaver Falls Knocker—	
Labor construction	$112.23
Labor patterns	2.50
Material	32.52
Wood patterns from Halteman	37.20
	$184.45
Tools bought	$ 27.09
Total Expense	377.16

Above is from May 1, 1895, to Aug. 17, 1895.

O. K. F. E. Mellinger.

EXHIBIT NO. 4

The Computing Scale Company,
Dayton, Ohio.

E. Canby, Pres. O. O. Ozias, Gen. Manager

Capital Invested, $160,000.00.

Important Notice.

The Keystone Store Service Company, of Beaver Falls, Pa., is about to begin the sale of a Computing Scale, the ownership of which is claimed by The Computing Scale Company, of Dayton, Ohio.

John W. Culver, who claims to be at the head of The Keystone Store Service Company, invented, while in the employ of the Dayton Company as an inventor, and prior to his discharge by the said Company, a scale of the same type as that now being made by the Beaver Falls Company. The Dayton Company proposes to protect its interests and will apply to the courts for the purpose, as

soon as the patent is issued.

In addition to its claim of ownership in this invention, it also claims that the scale made by The Keystone Store Service Company, while it will bear no comparison with its World-Renowned Dayton Computing Scale, is an infringement of important features of the Dayton Company's Scale, and persons using the Beaver Falls Scale may be held liable for damages for such use.

The Computing Scale Co.,
Dayton, Ohio.

EXHIBIT NO. 5

John R. Bennett
Patent Causes
Counsellor-at-Law
P. O. Box 629. Rooms 168-177
Potter Building
New York City, Aug. 10, 1895.

The Computing Scale Company,
Dayton, Ohio.

Gentlemen:

My clients, The Keystone Store Service Co., and J. W. Culmer, both of Beaver Falls, Pennsylvania, have brought to my attention certain circulars issued by you, wherein you say Mr. Culmer "invented, while in the employ of the Dayton Company as an inventor * * * a scale "of the same type as that now being made by the Beaver "Falls Company," and as to which you say The Dayton "Company proposes to protect its interest and will apply "to the courts for the purpose, as soon as the patent is "issued."

The truthfulness of that statement you must proceed to establish without a moment's delay, or retract it in the same public manner in which you have made it. You need not wait for the issuance of any patent or patents covering Mr. Culmer's inventions, in accordance with which The Keystone Store Service Co. is manufacturing its "Accountant" scale, for I have now to advise you that applications for Letters Patent covering the same are pending, which will furnish you sufficient basis for an immediate application to the courts for the protection of your interests.

If, however, you prefer to delay your application until "the patent is issued," I have to advise you that the patents will issue with a very short time; so that you can be preparing your papers upon which to make your application to the court the minute the patents issue, of which I will promptly notify you. Either you must proceed to protect your supposed "interests" by an immediate application to the court, or The Keystone Store Service Company and Mr. Culmer will make such an application for the protection of their interests, for you will not be permitted to continue your libelous and scandalous statements—obviously made for no other purpose than to suppress the business enterprise of manufacturing the "Accountant" scale in which my clients are engaged. To facilitate your application to the court for the protection of your "interests I am authorized by my clients to accept service of papers in any suit or suits that you may bring against them within the jurisdiction in which they reside. So, if you will instruct your counsel to forward all such papers to me, they will be at once returned with an acceptance of service endorsed thereon. You undoubtedly have a right to assert your claim of ownership of these inventions of Mr. Culmer, so long as you do it in good faith, but you will not be permitted to assert any such claim, or use it in the manner in which you have been doing, without taking prompt proceedings to have that claim judicially determined, and to that end, I am instructed to, and will, cooperate with your counsel to the fullest extent.

You say that Mr. Culmer was discharged "by the said Company", viz. The Computing Scale Co. of Dayton, Ohio. This statement, your correspondence with Mr. Culmer shows to be false, and could only have been made by you for the purpose of injuring Mr. Culmer and The Keystone Store Service Co., with which he is connected and which is the owner of the inventions made by him since leaving your employ, and in accordance with which inventions the "Accountant Scale" of the Keystone Store Service Co. is being manufactured. Unless you make an immediate retraction of that falsehood, and by means of circulars, in the same public manner in which you made the statement, I am instructed to, and will, institute proceedings such as are best calculated to prevent a continuation of the making of such libelous statements. Furthermore, I have to advise

you that you will be held strictly accountable for the damages resulting from the circulation of that falsehood. That it was prompted with the view of injuring Mr. Culmer and The Keystone Store Service Co. seems self-evident, and that it has done so, we shall be prepared to establish unless the demand herein made is at once complied with. My clients do not object to legitimate competition, but they do object to the use of such falsehoods, uttered for the sole purpose of injuring their business, and I am indeed surprised that a Company making the slightest claim to respectability and fair dealing, should attempt to use such a weapon against a competitor, quite irrespective of what may be the merits of your claimed ownership of these inventions of Mr. Culmer. If your claim is well founded in law, you will have no difficulty whatever in establishing it in the Federal court and procuring a prompt transfer to you of the patents covering such inventions. Proceedings instituted to that end, my clients will welcome, but they will not tolerate—if there be any way known to law to prevent it—the course which you any way known to the law to prevent it—the course which you have evidently determined upon, of disposing of their rights without the aid of the court.

As I have before stated, the minute the patents issue upon Mr. Culmer's pending applications covering his inventions which are embodied in the "Accountant Scale", I will notify you, that you may no longer have any cause for delaying that application to the court for the protection of your "interests," when I trust you will not lose a moment's time in making the application, for, of whatever nature it may be, you have my assurance that I will fully cooperate with your counsel to expedite it to a speedy determination.

You also assert in your circulars "that the scale made by "The Keystone Store Service Company * * * is an infringement of important features of the Dayton Company's Scale," and assuming that you have been so advised, and so believe, it is, to say the least, strange that you have not, before this, proceeded against The Keystone Store Service Co. for infringement of your patents, for you know its whereabouts and apparently are very familiar with the exact construction of its scale, even having gone so far as to print upon one of your circulars a cut of it. This, I demand, on

behalf of my clients, that you do at once, or else retract the statement that you have made. You will not be permitted to make any such statements and yet deny to The Keystone Company an opportunity to maintain the contrary. The Federal Court at Pittsburgh is open to you at all times for the bringing of such a suit—the Keystone Store Service Company being within its jurisdiction—and I am instructed by that Company to accept service of any papers in any such proceeding, as well as to furnish you—at the market price—with one of its scales, with a written admission as to its manufacture and sale, so as to avoid delay, and at the same time put you in possession of all that is necessary to enable your counsel to press any such proceedings to a speedy conclusion. Indeed, so anxious are my clients to have this issue of infringement determined, that I am authorized to stipulate to file an answer within thirty days from the bringing of any suit, and that each party shall close its proofs within thirty days, and that the case be heard as soon thereafter as the court can hear it. No obstruction will be placed in the way of the speediest possible determination of this issue.

Now, why not follow the manly course of leaving to the courts the determination of these disputed issues between you and my clients, rather than to attempt to take them into your own hands and seek to dispose of them to your own liking through the medium of circulars that are fabrications of the grossest and most libelous character, and to which no reputable business man or Company would stoop. To the one course my clients will not have the slighest objection, but to the other course they not only object, but if there be power in the courts to prevent it, as well as to give proper redress against it, they propose to avail themselves of it, giving you fair notice that they will hold you strictly accountable for all damages resulting to their business from such unlawful acts.

I had nearly overlooked calling to your attention your theft of the cut of my clients' "Accountant Scale" which appears on the two inside pages of the red colored circular issued by you. How you can justify that remains to be seen, but apparently it is without justification, and so wilful and deliberate seems to be its use, when taken in connection with the statements made referring to it, that I havt simply

to notify you that if its use is not at once discontinued, as well as the making of such statements as made in connection with its use, I shall lose no time in proceeding against you, in accordanct with the instructions which I have already received. *Some* things can be endured, but *others* are beyond endurance, and this red colored circular is one of the latter, and unless, between this and the 14th of September—when I shall have returned from my vacation—I am advised of its recall and a retraction of the statements therein contained, as well as a retraction of the other statements herein referred to, I shall at once take such affirmative proceedings as I deem necessary to protect the interests of my clients from a continuation of what is herein complained of.

Respectfully,

John R. Bennett.

EXHIBIT NO. 6

John R. Bennett
Counsellor-at-Law

Patent Causes
P. O. Box 629.

Rooms 168-177
Potter Building
New York City, August 10, 1895.

The Computing Scale Co.,
Dayton, O.

Gentlemen:

On behalf of The Keystone Store Service Co. of Beaver Falls, Pa., I notify you that it is the owner of certain inventions of J. W. Culmer, in accordance with which it is manufacturing its so-called "Accountant Scale", for which applications for Letters Patent of the United States are now pending, and upon which it is expected patents will soon issue.

This notice in advance of the issuance of the patents, is due to your having publicly offered to manufacture and sell the same scale as that being manufactured by the Keystone Store Service Company, and your instructions to your agents that—

> "If you prefer the Culmer scale, we will furnish it at one-half the Culmer price, and you will be expected, out of loyalty, to do this without any com-

mission or profit, and in this way discourage and drive out Culmer's salesmen—"

and is to advise you that if, after the issuance of the patents, you continue such offers and instructions, I am directed to, and will proceed against you, by bill in equity, for infringement of those patents, accompanied with an application to the court for a preliminary injunction, for such methods will not be tolerated for a single moment after my clients are in possession of the patents. If you have determined to continue such course after the issuance of the patents, will you be good enough to furnish us with one of your "Culmer scales", together with proper bill,—for which I will send you check by return mail,—that we may be in possession of that which will enable us to proceed with the bringing of our suit, and especially with our application to the court for a preliminary injunction, without unnecessary delay.

Respectfully yours,

John R. Bennett.

EXHIBIT NO. 7

(Out of Huntington Paper)

Many of our citizens this morning received copies of the Ft. Wayne Sentinel of Friday, which contained a rank and libelous article attacking the Keystone Store Service Co., which is about to locate a factory in this city for the manufacture of computing scales and other articles for store service. The article referred to wantonly attacks the character of the firm, questions the validity of their claims and patents and alleges that suits are pending against the Keystone Company by the Dayton company, for infringement of patents. The article in question was offered to both The Democrat and Herald of this city for publication but was refused for the simple and all sufficient reason that both papers were satisfied that the statements contained in said article were without foundation in truth and were intended only to injure the enterprise in the interest of the Dayton Company. The promoters of the enterprise in this city thoroughly investigated the matter before taking hold of it and were convinced beyond any doubt that the Keystone Company is not infringing on any patents held by the Dayton Company and furthermore they have an article which is in many partic-

ulars far superior to anything of the kind on the market. The location of the factory in Huntington is something that every citizen is interested in and as this is the last day to purchase lots and secure the factory, every person who possibly can do so, is urged to subscribe for a lot before it is too late. All subscribers for lots can have the best assurance in the world that the company is all right and that the factory will be a great benefit to the city.

EXHIBIT NO. 8

The Warner House
Jacob Warner, Propr.
Chillicothe, O., July 16th, 1896.

The Computing Scale Co., Dayton, O.
Gentlemen:

Messrs. Cotton Bros. of Athens, O., informed me, after I had spent some little time with them, that they would return their Stimpson Scale and refuse payment therefor. They had signed an order for it before writing us.

Messrs. Stalder & Co. of Athens, O., also have a Stimpson Scale. Their attorney was home sick today or they would have decided to do likewise, inasmuch as they said that if their attorney informed them that they were liable in any manner they would not keep nor pay for said scale.

Please have Miss Brown *write them the regular Stimpson letter.*

I arrived here at 6:30 tonight. Spent two hours after supper in looking about the grocery stores here for Stimpsons but as yet have found none—D. Ach & Bro. not being open. Will finish my search tomorrow A. M.

The Stimpson agent left Columbus five weeks ago; came down the Hocking Valley—stopped at Lancaster, Logan, Nelsonville and Athens. He took one week in reaching Nelsonville, since he left there on the 14th of last month, so I learned by telephoning from Athens to friends at Nelsonville. They could not tell me whether he had sold any at Nelsonville or not; but they heard him say that he sold two at Logan and three at Lancaster.

I am of opinion that we will find quite a number in Ohio by the time we get all around. However, it is to be hoped not.

I shall make a couple of stops between here and Hillsboro, reaching there late tomorrow.

Respectfully yours,

Ira C. Koehne.

EXHIBIT NO. 14

In the District Court of the United States for the Northern District of Ohio, Western Division

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al,

Defendants.

In Equity No. 307

AFFIDAVIT OF OREN BRITT BROWN

State of Florida, County of Volusia, ss.

Oren Britt Brown, personally known to me, a Notary Public of said County and State, and being by me duly sworn, deposes and says as follows, to-wit:

I am a resident of Dayton, Ohio, for about fifty years, I am a practicing lawyer, was Judge of the Court of Common Pleas from 1896 to 1913. Have been in active practice since my retirement from the bench. Am a member of The American Bar Association and admitted to the practice in the Supreme Court of the United States and the other Federal Courts. I have known Ira Chase Koehne for fifteen or twenty years. He was frequently before my Court in cases in which he claimed a personal interest. He was not a member of the Bar, but was a Patent Agent and Claim Agent. Since 1913 I have been Attorney for the Miami Conservancey District, a political sub-division established for flood protection in the Miami Valley. Koehne brought numerous suits against the District in injunction quo warranto and others, making charges regardless of the facts, in all of which he was unsuccessful. He left Dayton about three or four years ago, going to Indianapolis. I have the means of knowing said Ira Chase Koehne's reputation for truth and veracity in Dayton, and I know that reputation to be very bad. I would not believe him under oath. I have no interest in the Dayton Computing Scale Company or any other computing scale company, and am not and

never have been a stockholder or attorney for said Company or any other computing scale company. I am making this affidavit while visiting DeLand, Florida, a few weeks. I was informed by McMahon, Corwin & Landis, Attorneys of Dayton, Ohio, that said Koehne had filed an affidavit in an injunction suit brought by the Toledo Scale Company, against the Computing Scale Company of Dayton, and knowing that I knew Koehne, asked me to send an affidavit as to Koehne's reputation for truth and veractiy. I have dictated this to the Notary Public without any instructions, as requested by the letter from said law firm. Further, affiant saith not.

Oren Britt Brown.

Sworn to before me, Louise S. Gould, a Notary Public in and for Volusia County, Florida, and by the said Oren Britt Brown, signed by him in my presence, this 5th day of February, 1922.

My commission expires December 30, 1924.

Louise S. Gould,
Notary Public Volusia County, Florida.

(Notarial Seal)

EXHIBIT NO. 15

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, et al.,

Defendants.

AFFIDAVIT OF IRA CHASE KOEHNE

State of Ohio, Lucas County, ss.

Ira Chase Koehne, being first duly sworn upon his oath, says that he came to Toledo and is now here at the request of counsel for Toledo Scale Company for the purpose of giving an affidavit in this case bearing upon the affidavits of Edward Canby, Sampel Hastings and George M. Ludlow filed herein by The Computing Scale Company, and while in Toledo for that purpose has read the affidavit of Oren Britt Brown filed by The Computing Scale Com-

pany in the above cause on February 10th, 1922.

Affiant says that it is untrue, as he believes said Brown will upon reflection admit, that affiant brought numerous or any suits against the Miami Conservancy District in injunction or in quo warranto or otherwise, or that in any such suit affiant made any charges regardless of the facts, or that he was unsuccessful in any such suits. The fact is that affiant never brought or took part in any suits brought by anyone against the Miami Conservancy District, but affiant did, as defendant in the proceedings by which the Miami Conservancy District was established and the plans and the assessment roll approved by the court, oppose the official plan and the assessment roll before the Conservancy Court, and in the matter of opposing the assessment roll affiant carried that case on appeal to the Court of Appeals of Montgomery County, Ohio, and then to the Supreme Court of Ohio. Affiant had no other litigation of any kind with Miami Conservancy District.

Affiant further says that said Oren Britt Brown has had a bias and prejudice against affiant for many years past, which bias and prejudice was increased by reason of affiant's opposition hereinbefore mentioned to the plans of the Miami Conservancy District. Said bias and prejudice was such that when said Brown was a judge of the Court of Common Pleas of Montgomery County affiant disqualified said Brown to sit as judge in certain matters in which affiant was concerned. Said Brown has upon many occasions manifested his dislike for affiant and has gone out of his way in attempts to injure affiant in business and other matters.

Affiant further says that in his judgment it ill-becomes The Computing Scale Company, defendant herein, to assert that affiant is not to be believed under oath for the reason that The Computing Scale Company has in more than one hundred different cases vouched for affiant's integrity and truthfulness by offering him as a witness in behalf of said company in cases in which it was involved in both state and federal courts. Affiant had been in the employ of The Computing Scale Company for years before he was called upon by it to testify in many of said cases and the officers of said company had had full opportunity to know him and

know his character for truthfulness or otherwise at the times he so testified.

(Signed) Ira Chase Koehne.

Sworn to before me and subscribed in my presence this 10th day of February, 1922.

(Signed) Frank E. Miller,
Notary Public, Lucas County, Ohio.

EXHIBIT NO. 16

In the District Court of the United States for the Northern District of Ohio, Western Division.

The Toledo Scale Company,

vs.

The Computing Scale Company.

ORDER

This cause coming on to be heard upon the several motions, orally and otherwise made, of the defendant, The Computing Scale Company, to dismiss this action upon the several grounds pressed to the court's attention, was heard and is finally considered, and the court for reasons stated in a memorandum opinion to be filed as of this date does find each of said motions not well taken and each of said reasons not valid and does therefore overrule said motions severally. To which order of the court respecting each of said motions, the said defendant, The Computing Scale Company, is allowed an exception.

February 13, 1922.

(Signed) John M. Killits,
District Judge.

EXHIBIT NO. 17

In the District Court of the United States for the Northern District of Ohio, Western Division.

Toledo Scale Company,

Plaintiff,

vs.

The Computing Scale Company, Fidelity & Deposit Company of Maryland, First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank, and The Guardian Savings and Trust Company,

Defendants.

PRELIMINARY INJUNCTION

The plaintiff Toledo Scale Company having heretofore, to-wit, on February 10, 1922, submitted its motion for a preliminary injunction herein upon the evidence theretofore offered by it in support thereof, said evidence consisting of the verified bill of complaint, and amendments thereto, the affidavits attached to said bill of complaint and certain affidavits in support of said motion filed herein on or before February 10, 1922 and certain exhibits, and certain affidavits and evidence having been filed herein by the defendant The Computing Scale Company in opposition to said affidavits and evidence offered by the plaintiff, and said defendant having been given an opportunity by the court to obtain additional time for the filing of further evidence upon making application therefor to this court, and no such application having been made, and this the 13th day of February, 1922, being the day weheron the temporary restraining order last issued by the court herein expires, and said The Computing Scale Company now objecting to any further continuance of said temporary restraining order, the court finds it necessary for the preservation of the rights of the parties that it proceed to a determination of said motion for a preliminary injunction, and so proceeding the court finds:

1. That the evidence offered herein in behalf of

plaintiff tends to establish that the decree obtained by The Computing Scale Company against Toledo Scale Company in the United States District Court for the Eastern Division of the Northern District of Illinois on or about March 5, 1919, in the amount of $420,883.44 was obtained by fraud of said The Computing Scale Company extrinsic to the issues and matters then pending before and decided by said court, and that the showing of fraud on the part of The Computing Scale Company and of diligence upon the part of Toledo Scale Company in discovering and bringing same to the attention of this court are of such strength and character as that this court should, in the interests of justice, maintain the situation of the parties in status quo, pending a full inquiry and final determination with respect to said, alleged fraud of The Computing Scale Company.

(2) The court further finds that The Computing Scale Company has appeared herein and contested the merits of the questions raised by the bill of complaint and the motion for a preliminary injunction thereunder and has fully submitted its person and the said controversy to the jurisdiction of this court.

(3) The court further fiinds that in order to preserve the rights of all of the parties hereto, pending final hearing herein, it is necessary that the parties defendant be and they are hereby respectively enjoined and restrained until further order of the court herein as follows:

(a) The defendant The Computing Scale Company is enjoined and restrained from enforcing or attempting to enforce in any manner whatsoever the judgment and decree entered by the District Court of the United States for the Eastern Division of the Northern District of Illinois in the cause before said court entitled The Computing Scale Company, plaintiff vs. The Toledo Computing Scale Company, Defendant, No. 30024 in equity, and from enforcing or attempting in any manner to enforce payment by Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Co., or either of them upon the bonds in the amounts of $450,000.00 and $50,000.00 respectively, executed by plaintiff as principal and Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company as surety, as supersedeas and stay bonds in such suit, and from in any manner asserting any right or claim

based upon or under the said judgment and decree or the decree of United States Circuit Court of Appeals for the Seventh Circuit affirming the same.

(b) The defendants Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company are each severally enjoined and restrained from making any payment to said The Computing Scale Company or to anyone on its behalf upon or under said bonds hereinbefore mentioned or either of them, and from transferring or cashing any or all of the certificates of deposit held by said Fidelity & Deposit Company of Maryland and said United States Fidelity & Guaranty Company or either of them as security against its or their liability on said bonds, and from withdrawing from the defendant banks any of the funds on deposit with said banks respectively under said certificates of deposit held by said Fidelity & Deposit Company of Maryland or by said United States Fidelity & Guaranty Company, as security on their respective liabilities on said bonds.

(c) The defendants Second National Bank of Toledo, Ohio, First National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank of Toledo, Ohio, and the Guardian Trust and Savings Company of Cleveland, Ohio, and each of them are enjoined and restrained from paying to or on the order of Fidelity & Deposit Company of Maryland or United States Fidelity & Guaranty Company, or either of them, the principal or interest on or upon any of the certificates of deposit issued by them respectively in favor of said Fidelity & Deposit Company of Maryland for certified checks of plaintiff, the principal amount of said certificates of deposit being in the following amounts respectively: First National Bank of Toledo, Ohio, $50,000.00, Second National Bank of Toledo, $75,000.00, Northern National Bank of Toledo, Ohio, 50,000.00, The Commerce-Guardian Trust and Savings Bank of Toledo, Ohio, $75,000.00, The Guardian Savings and Trust Company of Cleveland, Ohio, $200,000.00.

(d) The defendant The Summit Trust Company is enjoined and restrained from selling or otherwise disposing of any collateral security which The Summit Trust Company as Trustee holds as security for loans made by

the defendant banks to plaintiff against which the certificates of deposit listed in paragraph (c) hereof were issued respectively.

This injunction shall become effective upon the giving of a bond by plaintiff, Toledo Scale Company, in the amount of $15,000.00 to the approvel of the court, and said bond having been given and approved this order is made effective forthwith. To the foregoing findings and orders severally the defendant The Computing Scale Company is allowed an exception. February 13, 1922.

John M. Killits,
Judge.

EXHIBIT NO. 18

In the District Court of the United States for the Northern District of Ohio, Western Division.

OPINION

No. 307 in Equity
Toledo Scale Company

Plaintiff,

vs.

The Computing Scale Company,

Defendants.

Killits, J:

In 1910, the defendant in this cause, The Computing Scale Company, of Dayton, Ohio, began an action against the plaintiff, The Toledo Scale Company, under its former corporate name, in the District Court of the United States of the Northern District of Illinois. The bill alleged infringement of certain patents on improvements to computing scales and demanded the usual relief. This litigation continued until the current year, an interlocutory decree having been entered against the plaintiff here by the District Court, which was affirmed by the Circuit Court of Appeals of the Seventh Circuit: a final decree, with a finding of damages in a very large amount entered by the District Court, which decree and finding were subsequently, on appeal, affirmed in September, last, by the Circuit Court of Appeals. Certiorari was denied by the Supreme Court of the United States on January 9. Some important incidents in this litigation will necessarily be discussed further on in this mem-

orandum.

On January 9, following the announcement of the refusal of the Supreme Court to allow a writ of certiorari, the plaintiff filed in this court a bill of complaint, charging the defendant corporation with unfair competition in restraint of trade in the exercise of a determination by unfair means to suppress all competition in the manufacture of scales, of which this suit against the plaintiff here in the Illinois court was an incident, and specifically charging that the defendant, plaintiff in the Illinois case, had been guilty of active suppression and destruction of evidence prejudicial to its claim of priority to the patents upon which it sued, such conduct being preliminary to and in perparation for its action in the Illinois case. The bill was positively verified, setting forth the allegations of fact in great detail and was supported by a series of affidavits lending color to the charge of active suppression and concealment of material evidence. Other defendants to the bill were several surety companies who secured plaintiff's bond in appeal and on stay of the mandate from the Circuit Court of Appeals pending proceedings in the Supreme Court and several local banks who were secured by plaintiff's collateral in the certification of checks for the security of the surety companies. The plaintiff is a non-resident corporation, which is also the case of the defendant. The defendant surety companies are subject to service within the court's jurisdiction.

The prayer of the bill was for an injunction restraining the surety companies from making good the bond and the banks from disposing of the collateral, and the defendant, The Computing Scale Company, from executing the decree for the finding of damages.

For convenience and brevity, the parties hereafter will be referred to as the plaintiff, the defendant meaning The Computing Scale Company, the surety company defendants and the bank defendants.

This court being then engaged in a protracted criminal trial commenced on the 5th of January, a case which is not yet concluded, and being deeply engrossed in other unfinished work, set 4 o'clock of the afternoon of January 19, for the hearing of the application for a temporary injunction. At that time the parties to the cause were present by counsel,

and the hearing was entered upon and evidence in behalf of the motion adduced in the form of a verified bill and affidavits, with a motion pressed by plaintiff for the fixing of a time for further hearing upon oral testimony. Because of the matters engrossing the court's attention, this application was impossible to final consideration, but pending it, at this hearing defendant tendered a verified answer, with exhibits, by which was attempted to raise questions of jurisdiction, of revelancy and materiality of certain averments of the bill, *res judicata* and, as well, and in great detail, the merits of the action itself. With great earnestness it was urged that the court was being invited merely to review the final decrees of another court of competent jurisdiction respecting the rights of the parties here.

This quesion the court took under immediate consideration without prejudice to the rights of the parties to introduce, pending such consideration, further testimony upon the merits of the contention. Records and documents involving more than hundred thousand words of reading matter having been tendered us, besides consideration of many authorities we have been forced to continue from time to time the temporary restraining order by renewals at the expiration of each ten days. This was done without objection on January 19, but, January 28, a second renewal was had over the objection of the defendant whose counsel insisted that the court was powerless to extend a temporary restraining order beyond its original ten days of life. This objection we have disregarded upon a memorandum opinion, the essential parts of which are as follows:

> "As noted in the record (order of January 19) the present question arising in this case is upon the motion of the defendant, The Computing Scale Company, to dismiss the application for a preliminary injunction. We are urged that, under the provisions of Section 17 of the Act of October, 1914, commonly known as the Clayton Act, the defendant has claims upon the court's attention and

for the court's immediate consideration, which are paramount to any other matter before the court except older matters of the same character. The language of the statute is as follows:

> "In case a temporary restraining order shall be granted without notice in the contingency specified the matter of the issuance of a preliminary injunction shall be set down for hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require."

"The language of the statute is substantially that of Equity Rule 73. Our view of both statute and rule is that they control the court to the extent only (and within that limitation of course fully) so far as the particular facts, in the exercise of a wise discretion, permit a full compliance therewith consistent with the interests of the parties. We do not believe that either is a hard and fast command that the right to a preliminary injunction must be determined within ten days after the issue of a temporary order, or that the applicant for a preliminary injunction can have no protection after the expiration of ten days if within that time circumstances are such that that he was unable to get to the court his case on the interlocutory motion, nor is it a requirement upon an already over-burdened court to pass upon

a motion for a preliminary injunction within the limitation, no matter how much labor is involved in due consideration. We feel that the law of either is fully honored if the court requires the applicant to proceed diligently, within the limitation, to the prosecution of his interlocutory motion, and that it is clearly within the discretionary power of the court to continue his temporary protection until there can be presented, reasonable diligence being pursued, all the facts bearing upon the proposition, and that, further, the court shall have due opportunity to consider the issues and questions involved. In the case before us, within the ten days, the complainant duly entered upon the presentation of facts supporting the motion for a preliminary injunction, asking for time to present further evidence. The complainant was met by the motion of the defendant to dismiss upon which defendant alone has offered the equivalent of more than three thousand pages of printed record, and we are invited by both parties to consider the numerous affidavits and exhaustive brief with a large number of citation of authoritites. Surely no one ever contemplated that either rule or statute should be applied, as defendant would apply it, to such a situation as this. Attention is called to the last clause of the statute that upon motion of the opposite party to modify or dissolve the order, "the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require." We are just now considering such a motion and we propose to do just what the statute advises. But what is "expetition" depends upon the volume of work thrust upon the court to secure a proper determination.

Entertaining the views above set forth, and because of the matters of fact above stated which work

compelling reasons therefor, but still endeavoring to be as expeditious as possible, we are entering contemporaneously with the filing of this memorandum an order extending the operation of the temporary restraining order for an additional period of ten days, within which time counsel may complete their presentation of briefs and affidavits bearing upon said motion of the defendant. If the court is unable to dispose of the motion within ten days, we purpose to further extend the period, and we deem it entirely within the court's discretion, if the motion to dismiss should be determined adversely to the defendant to extend on proper terms the time even beyond ten days, during which the temporary restraining order shall remain in force and within which time plaintiff may complete its proof supporting its demand for a preliminary injunction.

"The proof by affidavit already made is sufficiently impressive to suggest that there was no improvidence in the issuing of the temporary restraining order and the unanswered affidavits filed by plaintiff on the 26th, together with our hasty review of defendant's answer, leave the court with no present feeling that the motion of defendant to dismiss might be allowed in the exercise of a just discretion. On the facts now appearing, we find stronger ground to justify a temporary restraining order than even in the first instance. It is to the defendant's interest, rather than otherwise, that we should take more time on its motion. We are convinced that in this we are in accord with approved practice. Mississippi Valley Trust Company vs. Railway Steel Spring Co., 258 Fed. 346; Chicago, etc. R. R. vs. Callicotte, 267 Fed. 799."

During the interim, two amendments to the bill have been filed, the surety companies have filed answers and cross bills and the defendant has supplemented its original answers by answer to the amendments of the bill and the cross bills of the surety company defendants Numerous additional affidavits, largely in behalf of the plaintiff, although some have been offered by the defendant, have come in addressed to the merits.

It is unnecessary to multiply authorities upon the proposition that an action such as is planted here will lie in this court. Many of the cases are collated and commented upon by Judge Booth, sitting in the Circuit Court of Appeals for the Eigthth Circuit, in Chicago, Rock Island and Pacific Railway vs. Callicotte, 267 Fed. Rep. 799, reversing a decree for defendant which denied complainant relief because of fraud alleged to have been perpetrated in the securing of a judgment in a State court. Certiorari was denied in this case by the Supreme Court on the 7th of March, 1921. Important decisions of the Supreme Court are the leading case of United States vs. Throckmorton, 98 U. S. 61, and Marshall vs. Holmes, 141 U. S. 589, upon which Judge Booth comments in the Callicotte opinion, and, also, the recent case of Wells Fargo & Co. vs. Taylor, 254 U. S. 175. The question was early before the Circuit Court of Appeals of the Seventh Circuit, where again the judgment, whose enforcement was sought to be enjoined, was that of a State court. Graver vs. Faurot, 76 Fed. 257.

It seems to be the theory of counsel for the defendants that the plaintiff in this case should have addressed the Circuit Court of Appeals with a bill for review and that to come into this court is to invite a breach of comity between courts. In this position we are of the opinion the defendant misunderstands the character of the action. If it is the subject of a bill for review, application should be addressed to the discretion of the court rendering the judgment. But

there is no claim here on the part of the plaintiff that there is error of law apparent on the face of the decree and the proceedings upon which the decree is founded, or that relief is sought because of new matter which has arisen since the decree, or, as we view the situation (the question to be hereafter discussed) for relief because of newly discovered evidence which could not have been found and discovered and used in the exercise of reasonable diligence before the final decree. A bill of review is possible only when one of these three conditions exist. Hill, et al. vs. Phelps, et al., 101 Fed. 650. A bill of review can be filed only by leave of the court in which the judgment or decree in question is entered and is considered to be nothing more than merely a continuance of the original action. On the contrary, a complaint to enjoin the execution of a judgment or decree for fraud begins an independent suit in equity which may be filed as a matter of right. An illuminating opinion on this subject is by our own Circuit Court of Appeals, Cochran, Judge, Dowagiac Mfg. vs. McSherry Mfg. Co., 155 Fed. 524. On page 528 of this case (155Fed.) the court says:

> "The radical difference between these two kinds of bills is that a bill of review is a continuation of the original litigation, whereas a bill impeaching a decree for fraud is not. It is new and independent litigation. The rules applicable to the two kinds of bills are different. As, for instance, it is well settled, in certain jurisdiction at least, that a bill of review cannot be filed after a decree has been affirmed on appeal, at least where the ground thereof is newly discovered evidence, unless the right to file it has been reserved in the decree of the appellate court, or permission be given on application to that court directly for that purpose. Southard v. Russel, 16 How, 545, 14 L. Ed. 1052; 2 Bates on Fed. Eq. Prac Sec. 717. But such is not the case as to a bill to impeach a decree for fraud. It can be filed without such

leave being first had. 2 Daniell's Ch. Pl & Pr. (5th Ed.) 1584; 2 Beach, Mod. Eq. Pr. Sec. 834; Ritchie vs. Burke (C. C.) 109 Fed. 16, 18."

Another Circuit Court of Appeals case of interest is Hendryx vs. Perkins, 114 Fed. 801, 807. The circumstance that it was in the nature of a bill of review is not sufficient to divest it of the character of an original bill, Wickliff vs. Eve, et al., 17 How. 467. Sec. See also, Johnson vs. Waters, 111 U. S. 640; Barrow vs. Hunton, 99 U. S. 80. In Wells Fargo vs. Taylor, 254 U. S. 175, the very question of comity obligation is discussed, holding that section 265 of the Judicial Code (R. S. 720) does not apply to this situation. On pages 183, 184 citing and following Marshall vs. Holmes, supra, it is observed that such a proceeding as this is not a revision of the judgment under scrutiny nor an attack upon the litigation producing the latter, but it effects individuals, only, who claim rights under such judgment.

We see no reason whatever why it should be assumed that to entertain this suit would be to give offense to the court in which the decree was entered.

We have examined authorities relied on by defendant (107 U. S. 3; 111 Fed. 269; 254 U. S. 425; 107 Fed. 781; 212 U. S. 444; 203 Mass. 159, and others). In our judgment, they are not, on their facts, in conflict with the conclusions to which we arrive in this memorandum. The citation of Hendryx vs. Perkins, 114 Fed. 801, is peculiarly infelicitous. In this case, the bill to impeach the decree was filed in the court rendering it. The court says that to call it a bill of review was to use a misnomer. On pages 807 and 808 of the report, the opinion says:

"Coming to the first question, the bill now before us is one to file which, as already said, no leave of court was required. It is in fact a bill to impeach a prior decree for fraud, and therefore it is an original bill, although in the nature of a bill of review, Story, Eq. Pl. (10th Ed.) sec. 426; Adams, Eq. 419; Dan-

iell Ch. Prac. (6th Am. Ed.) 1584.

"The fact that proceedings of this nature are of such a character that they may be maintained in the federal court in which the original bill was decreed on, without reference to the citizenship of the parties or other jurisdictional questions, does not contravene our propositions. This is fully explained in Carey v. Railroad Co., 161 U. S. 115, 128, 131, 16 Sup. Ct., 537, 40 L. Ed. 638. The citations there made show that, although this proceeding may be ancillary for jurisdictional purposes, it is original and independent in the chancery sense."

The facts in American Seeding Machine Co. vs. Dowagiac Mfg. Co., 241 Fed. 857 (By our own Circuit Court of Appeals, are so entirely dissimilar from these in the instant case that we see no importance in it in this discussion.

The case just cited, and others upon which comment might be made, recognize no distinction in principle between judgments entered in state courts and judgments entered in federal courts. Each class of courts is a foreign court to this court under such circumstances. Nor does it make any difference, as we read the authorities cited, that the Circuit Court of Appeals for the Seventh Circuit still had control of the judgment and decree when the bill was filed here. In the Callicotte case, it will be noted, the bill which the Circuit Court of Appeals held should have been entertained by the District Court was filed while the judgment complained of was pending on appeal in the appellate court of Missouri. The decree was already absolute, subject to a discretion in the Circuit Court of Appeals, but plaintiff's right to impeach it for fraud was not a matter of discretion, but was absolute. If we are right in the conclusion to which we arrive, in discussing hereafter the question of *res judicate,* that there is not here merely an effort to introduce newly discovered evidence, it follows that a proceeding to reach the relief here sought could not have been begun in the Circuit Court of Appeals of the Seventh Circuit, because it would have been in

the nature of an original bill. Only a District Court could entertain such a bill. In Hendryx vs. Perkins, *supra*. the bill was brought in the court of the first instance. The plaintiff could have gone either into any district where it could have had service, or where any of its rights existed which were in peril of the decree. Here the bank defendants had its collateral to secure its sureties and here, also, it could reach its sureties. It seems indisputable that this was an appropriate forum. There is nothing to indicate an equal appropriateness in the District Court for the Northern District of Illinois. We are constrained to hold adversely to defendant's contention on this point, as well as that there is a misjoinder of parties.

It appears that the plaintiff here did not offer the District Court in Chicago any evidence to support its allegation of prior public use and sale of the Phinney patent, relying alone upon the disclosures of the patent itself as sufficient to anticipate the Smith grant. Pending appeal from an adverse decree, however, an investigation was made by the defendant (the plaintiff here) as to what was done under this patent, and the reseult thereof, embodied in certain affidavits, was used in 1913 to found a motion in the Circuit Court of Appeals to dismiss the appeal, with leave to introduce in the District Court the alleged newly discovered evidence as shown by these affidavits. As exhibits *to those affidavits*, three scales were offered, alleged to have been made and used, following Phinney's disclosures, over two years prior to the application for the Smith patent. The Circuit Court held that its discretion was appealed to by the application and that, enjoying such discretionary power, it should not direct a re-opening of the case by bill of review or otherwise. The court says:

> "In our view the court would have no right to let in the new evidence. It is obvious no diligence whatever was exercised in this matter. The matter was instantly discoverable by inquiry in the neighborhood affected. It is like a suit respecting boundary lines. Some one living along the boundary line

knows about it and avers it on information and belief, but does not prove it, and then wants to reopen. He is not permitted to do that."

It might be even impertinent for us to suggest that the discretion was rightfully used. We see no discourtesy, however, in suggesting that it is not only not unlikely, but, as we view it, highly probable (a conclusion we reach from a consideration of the affidavit evidence then before the Circuit Court of Appeals, together with the three exhibits) that that court found the defendant (the plaintiff here) not only wanting in diligence, but that it had not suggested by affidavit a *prima facie* case to carry the burden to make, beyond a reasonable doubt, a defense of prior use, and that upon the affidavit facts the case was within the fact analogy of such decisions as the Corn Planter patent, 23 Wall. 18y; Smith vs. Goodyear Dental Vulcanite Co., 93 U. S. 486; the Barbed Wire patent, 143 U. S., 275, and Deering v. Winona Harvester Works, 165 U. S., 286. We cannot assume, of course, that in view of the public interest, that court would have ignored evidence against a monopolistic claim merely because it had not been diligently sought by a party who, in a quasi capacity, at least, represented the public. An examination of these affidavits, so far as they approach the character of the charges made against the defendant here, and construed in connection with the representations to support which they were used that the defendant here, knowing the facts which were in them, ignored them in making its case, indicate to us their insufficiency to make a *prima facie* case of fraud by defendant. Some rhetoric, of course, was used to the effect that the concealment was sinister and fraudulent, but justification of this language, occurring in the several applications and briefs of the plaintiff here in all the courts, including the petition for writ of certiorari in the Supreme Court, is referable to the character of the facts themselves as shown

by the affidavits. To the defendant here must be accorded the privilege of an honest judgment whether the facts charged by the affidavits to be within its knowledge were of such character that, ignoring them, it could honestly press its contention that the Smith patent was valid and that it might ethically withhold a disclosure of them to the court. There was no reason why it should anticipate defenses which it deemed inadequate by apprising the court in the first instance of their existence, and there was no reason, either, why it should think, in view of the decisions we have cited above, that a defense of prior use to a reasonable certainty was indicated by the affidavits.

As far as we have any right to go here, without impertinence toward the Circuit Court of Appeals of the Seventh Circuit, it is to examine the record to see whether that court, or any other court, had before it the issue now attempted to be presented by the complaint and, having had such issue, has decided it. We find quite clearly from an examination of the record as brought up by defendant's answer and exhibits that not only did the Circuit Court of the Seventh Circuit act have all of the facts now exhibited to this court by *ex parte* affidavits, but that it made no pretense anywhere along the line to decide the question whether the defendant here was guilty of actively fraudulent concealment of known facts vitally affecting the issues of its litigation. We have already quoted the reason given in 1913 by the Circuit Court of Appeals for denying the application to bring the alleged Phinney anticipations into the record. Nor does it appear that the issue of fraudulent concealment was, as now made, ever brought to the attention of any other agency for the determination of the merits of the litigation. The answer herein itself says that this alleged anticipation evidence was offered before the master "solely as a basis of comparison." The essence of the Circuit Court of Appeals' decision touching upon the question of alleged *res judicata* is found in its opinion upon

the final review in 1921 when that court was asked to review its denial of defendant's (this plaintiff's) 1913 petition for review and to reverse its early decree upholding the validity of the patent. Respecting the argument of the plaintiff here touching this matter, the court said:

> "If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leads us to reject the demand."

We interpret that as meaning that the merits of the decree are not affected by the disclosures of the 1913 affidavits, and that they were not sufficient in effect to suggest that a full hearing would show that the burden of proving prior use beyond a reasonable doubt might be sustained. It seems plain that the court is, in this, affected by the principle of the cases cited above (23 Wall. 181; 93 U. S. 486; 143 U. S., 275; 155 U. S. 286). The court further says:

> "If its (the Toledo Scale Company's) insistence that, on the proofs offered to the master and embodied in the record covering Phinney's commercial practice as an anticipation, the court should reverse its 1913 decree upholding the validity of the patent, be regarded as a petition in the nature of a bill of review, appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its formal bill of review on the same grounds, inclines us to stay our hands."

There is nothing in either of these conclusions of the Circuit Court of Appeals to suggest that it decided the merits of a charge that its decree of 1913 was assisted by a fraudulent concealment by the plaintiff (this defendant) of material facts known to it and by an actual suppression of important testimony inimical to its contention.

In the petition for certiorari, the Toledo Company said to the Supreme Court:

> "The affidavits further showed that plaintiff had had full knowledge of the Phinney scales for more than ten years, that evidence and numerous samples of them had been introduced in a suit which plaintiff had brought at Philadelphia ten years earlier upon the reissued patent here in suit, that the prosecution of said suit had been abandoned because of such evidence, and that plaintiff had suppressed and concealed such facts from the court and defendant throughout the litigation in the present case."

The strength of this charge, assuming that, superficially, it is broad enough in its wording to raise the same issue as attempted here, is ponderable by the use of the 1913 affidavits themselves and nothing else. The question before the Supreme Court, therefore, if it ever considered it at all, was just that before the Circuit Court of Appeals of the Seventh Circuit in 1913, and no broader. It would be to burden this memorandum to quote the several motions made at various times upon which the Circuit Court's conclusions are based. It is sufficient to say that they do not invite the court to consider anything more than indicated in the court's comments.

In the present case, the plaintiff charges the defendant not merely with concealing from the court facts which the plaintiff here discovered and disclosed to the courts of the Seventh Circuit Court and the Supreme Court in its 1913 affidavits, which the courts directly or constructively found were not of sufficient weight to justify the exercise of discretion in its favor, but plaintiff goes farther and alleges that the Dayton Company actively and affirmatively suppressed, by acquisition and concealment, evidence inimical to its contentions, which was of a character so important that for its cumulative effect, if for no other, equity and good conscience required that it should have gone before the court.

The difference between the two states of fact, that presented to the court rendering the decree, and that em-

bodied in the bill and the record here, is not merely one of degree but of quality. Such affidavits here which repeat, in substance, the 1913 affidavits contain averments of much additional and important matter directly to the question of active fraud. Even if it were of degree merely, it would not be controlling, for cumulative evidence on a question of prior use in patent litigation, because of the monopolistic character of a patent right, is to be highly regarded and sought for. An accumulation of facts to the same point might make the evidence so strong as to carry the burden of proof required. There is another line of cases which, compared with the Cornplanter decision (23 Wall. 161) and the other cases above referred to, emphasizes this distinction, such as Coffin vs. Ogden, 18 Wall. 121; Egbert v. Lippmann, 104 U. S. 333; Brush v. Condit, 132 U. S. 39.

As we read the record in the litigation, all the defendant therein was then charging against the plaintiff was an ignoring of certain facts, a passive attitude toward them, while here the charge is that, deliberately and with a fraudulent purpose, and for the purpose of getting prejudicial testimony out of the way, an active campaign was prosecuted by the plaintiff in the litigation in question to buy up and destroy the physical evidence of prior use. To our mind the distinction is very plain indeed, and we are very clear that the issue as now presented was not involved in the litigation between the parties in the courts of the Seventh Circuit; wherefore, we hold that the plea of *res judicata* is not well taken. Even if we entertain somewhat of the views of counsel respecting the issues before the courts in the main litigation, it is still arguable whether, under the circumstances here, the bill will not lie. On that point the language of Mr. Justice Story in Ocean Insurance Company vs. Fields, 18 Fed. Cases, 532 (No. 10406) as follows, is apt (p. 539):

> "But the parties admit, for the sake of the argument, that the point of fraud was made at the trial; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and

satisfactory proofs; and that the boring of the holes was not known or suspected at the trial; and that it was not and could not therefore then be a matter of controversy. Now, I agree that mere cumulative evidence to the fact of fraud or any other leading fact not discovered since the trial, will not ordinarily constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end of litigation, or, as was pointedyl said by a great jurist, that suits may not be immortal, while men are mortal. But I do not know that it has ever been decided, that, in an assignable case, where the defense has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly-discovered evidence has come out, full, and direct, and positive, to the very gist of the controversy, a court of equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of courts of equity, upon this head, seems, as far as I can gather it, not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out."

We are satisfied, as the record now stands, that the plaintiff should not be charged with a lack of diligence in not discovering, before the final decree in Chicago last fall, the cricumstances upon which it predicated active fraud.

Other contention of defendant we find not well taken. The local bank defendants seem to us to be necessary parties if the plaintiff is to get the relief to which it claims to be entitled. - The several motions of defendant are overruled. The motion to strike out we ignore because it is plainly waived, if, in fact, each of the others is not.

In support of its motion for a preliminary injunction, plaintiff has filed, besides the verified petition, thirty-one affidavits from twenty-seven parties, and has abandoned its requests for an opportunity to introduce oral testimony. Although given an opportunity so to do, the defendant, although having filed five affidavits to the merits, has declined to offer further testimony. In our judgment, the cumulative effect brought into this record respecting defendant's alleged business methods in the past and its activities and experiences in litigation, directly and through alleged subsidiaries, and its alleged connection with lobbying against certain proposed measures for state legislation to secure honest weighing machines, directs the court's discretion to the granting of a writ of temporary injunction. Several of these affidavits are from former employes of the defendant, including even the grantee of the patent which was made the basis of the suit in the Seventh Circuit, are flatly and directly to activities on the part of their employer, the defendant here, in an effort to secure from use as proofs of anticipation, all the Phinney scales possible to be found, and further to the effect that in considerable numbers such scales were found and taken into the secret custody of the defendant. These affiants claim to have been active agents in these practices, and they affirm the purpose of their employer to have been in fraud of the rights of the public. Other affidavits contain allegations of trade conduct on the part of the defendant of such a character that, if true, the characterization of the design of the defendant in the alleged buying up of Phinney

scales is supported. Although, as we have said, defendant has introduced affidavit testimony to the merits, these are not, except in one minor instance, in direct denial of this very important testimony of the plaintiff.

Of course we are not to be understood that we are adjudging defendant to be guilty, either of the direct charge, or of any of the alleged lines of practice referred to which are offered for interpretative effect. This *ex parte* testimony is of such a character and cumulates to such a point that the defendant has but itself to censure if the court acepts it for its face value, only, to be sure to control its present discretition. The fulest opportunity has been afforded defendants to meet these charges fully—that it has done so in a minor degree only is its choice. Space does not permit a further analysis of this bulky testimony. It is sufficient to say, in addition, that defendant's assertion that the proof is no different form that before the courts in Chicago is not well founded. It contains, of course, the same testimony, but additional evidence of an entirely different character. The *ex parte* proof of non-discovery before final decree, and lack of ability to discover, is uncontradicted and satisfactory. The question, therefore, before us is: Has the plaintiff made such a *prima facia* showing of its contention that the judgment and decree complained of by it is tainted with the fraud of the beneficiary that we should allow the issue to be thoroughly heard in the usual way, and, that pending such hearing, plaintiff should be protected by a preliminary injunction. To this question we must return an affirmative answer.

The facts set up in these affidavits do not constitute a matter of newly discovered evidence merely. To be sure, had they been before the courts in the Seventh Circuit, and accepted by those courts, they would have had an important bearing upon the result. But newly discovered evidence which should be brought to the attention of the court in a patent case by way of bill of review is evidence upon one of the issues of the case. Here the plaintiff by its affidavits is not merely offering additional evidence of anticipation,

which, of course, is the fact, but it is offering evidence explaining why it could not have still further offered additional evidence in the first court, alleging that its default was because of the active fraud of the defendant in putting such evidence beyond the reach of the plaintiff or any one else.

All other objections of the defendant to the entering here of an interlocutory decree not specifically noticed in this opinion are overruled. The plaintiff may have a preliminary injunction as prayed for in its bill and amendments thereto. We have been shown in a memorandum a computation which plaintiff assumes to suggest the lack of necessity of anything more than a nominal bond. It may be that this computation proves that defendant will not suffer any loss of the principal and interest of its findings in case a final decree here should not run against it, but that is not the whole measure of its possible damages. It is ordered, therefore, that the preliminary injunction here awarded be effective only on the plaintiff entering into the usual bond in the sum of Fifteen Thousand Dollars. The defendant has exceptions to the overruling of its several motions and to the allowance to plaintiff of an interlocutory decree as above stated.

February 13, 1922.

John M. Killits,
District Judge.

Since the preparation of the foregoing memorandum, our attention has been called to a citation served upon the plaintiff in this case, and the defendant surety companies, and issued out of the Circuit Court of Appeals of the United States for the Seventh Circuit, to show cause by the 21st instant why plaintiff and said defendant severally should not be enjoined from proceeding with this case. This orders appears to have proceeded from the filing of a verified petition therefor filed in said court. The petition is signed by one of the counsel for defendant (Mr. Zane) who has been most active in defendant's cause before this court.

In view of the record made here by defendant, the Dayton company, and its counsel, the effort to restrain this preceeding by attacking the parties may hereafter become the subject of serious consideration whether it is not an affront to this court. It is our view that the defendant, Dayton Company, has appeared in this case upon the merits —that it is fully committed to meet every contention which may properly arise herein.

The temporary restraining order set the afternoon of January 19, at 4 P. M. for the hearing of the motion for a preliminary injunction. On that occasion, the defendant by its counsel and one or more of its officers was present in court at the taking up of the case. Without objection, the plaintiff proceeded to the introduction of affidavit testimony, including the tendering in that behalf of its verified complaint, upon the motion for a preliminary injunction, and then moved the court for a date at which the court might hear oral testimony in further support of the motion. Thereupon counsel for the defendant (Mr. Zane) arose and after some argument to support his theory that by virtue of Section 17 of the Act of October 14, 1914 (the Clayton Act) the court must, instanter, pass upon the motion for a preliminary injunction, presented a verified answer on behalf of the defendant, and proceeded directly the file the same, together with three affidavits, following with an argument on the question of res judicata attempted to be raised by the answer, and moving, on the averments of the answer, to dismiss the complaint. This answer, with its printed exhibits, contains, by the most conservative estimate more than twenty-five thousand words. The first paragraph attempts to raise special defenses, including alleged want of jurisdiction both of person and subject-matter, misjoiner of parties, pending action covering the same subject-matter and between the same parties in another court, and that this court as a matter of usage, practice

and comity should not attempt to enjoin enforcement of a decree of another District Court where the latter court can grant full relief. By the second paragraph, defendant moved for an order striking out certain portions of the complaint for impertinence, irrelvancy and immateriality. The third paragraph moved to dismiss the bill for want of substance, and for insufficiency in point of law. The fourth paragraph, without going into any particulars, alleged that the plaintiff has been guilty of such laches concerning the subject matter as that it is disentitled to any relief as herein demanded. The fifth paragraph, with particulars, sets up a plea of prior adjudication. Each of these several paragraphs of the pleading attempts to reserve a special appearance. The sixth paragraph contains this language:

> "6. The defendant, The Computing Scale Company, not waiving the defenses set forth in the preceding paragraphs 1, 2, 3, 4 and 5 of this answer and each of them and each of the clauses thereof, for answer to the said bill of complaint says:"

Following, the pleading then takes up in detail each of the numbered paragraphs of the complaint, fully pleading thereto the defendant company's defenses. Subsequently, the defendant answered in substantially the same way to two amendments to the complaint and the answer and verified petition for affirmative relief filed jointly with the surety company defendants. In addition, the defendant has filed four affidavits upon the merits in opposition to the affidavits for a preliminary injunction offered by the plaintiff. Three were filed February 7 and one February 10, to meet testimony of the plaintiff.

This record we think made up an effective entry of appearance of the defendant for all the purposes of this case.

Walker vs. Robbins, 14 Howard, 584.
Shields vs, Thomas, 18 Howard, 253.
St. Louis, etc. R. Co. vs. McBride, 141 U. S. 127.
Jones vs. Andrews, 10 Wall, 327.
Texas etc. Ro Co. v. Cox, 145 U. S. 593.
Baltimore, etc. R. Co. v. Dotty, 133 Fed. 866.
Fidelity & Guaranty Co. v. Woodsen County, 145 Fed. 144.
Peale v. Marian Coal Co. 172 Fed. 640, 204 Fed. 162.
4 Corpus Juris, pp. 1333—1336, inclusive.

Other authorities exist. We regard it as settled that a party may not so blend pleas, as attempted in this case, that he may enjoy each, in succession, and that so to do works a waiver of those which do not reach the merits. Of course we should allow the plea of *res judicata* to remain, however, artificially or informally it may be in the record.

The conclusion is irresistible that defendant, the Dayton Company, and its counsel are proceeding unadvisedly and to the embarrassment of this court in the attack in question upon their adversary and the defendant surety companies.

Under these circumstances, we do not think we are, in any degree, in disrespect of the Circuit Court of Appeals of the adjoining Circuit in completing and filing the foregoing memorandum and in issuing the appropriate orders thereon. We feel justified in assuming that the order upon the plaintiff herein and the defendant surety companies to show cause before the said Circuit Court of Appeals on the 21st instant, issued as a matter of course on the *ex parte* showing therefor, filed therein by the defendant here

February 10, a true copy of which petition is before us. That this document was hastily prepared is shown by several misstatements and distortions of fact which it manafestly contains. Some of these are inferentially dealt with in the foregoing memorandum, bnt two of which misrepresentations, very substantially, of this court, we may here notice at length.

First, on page 7 of the petition to show cause occurs this:

> "7. That on January 20, 1922, as of January 19 1922, the said District Court of the Northern District of Ohio, Western Division, made and entered its order continuing said temporary restraining order in force for an additional ten days."

The purpose of this must be nothing less than to establish a belief that on January 20, when, by reason of section 17 of the Calyton Act, the court's order of January 9, if not renewed, was inoperative through expiration, January 19, of its ten days of life, this court attempted to resuscitate it by retroactive action. The fact is that on the evening of January 19, at the hearing and from the bench and in the presence of counsel for defendant who subscribed to the said petition to show cause, the court, taking issue with the defendant's counsel (Mr. Zane) that Section 17 of the Clayton Act was so compelling upon the court that it was required to set aside pending unfinished business entered upon before this case was even begun, that the hearing upon the motion for preliminary injunction should be completed, and after reminding counsel for defendant that already had been entered upon a presentation of the merits of the application for a preliminary injunction, announced an extension of the temporary restraining order in this language:

> "It is simply impossible to carry on this hearing in view of what the court is now engaged in. There can be no substantial prejudice to the parties if the

> court is allowed time enough to get its bearings on these sharp contentions that you are making this afternoon. As you say, the mandate of the Supreme Court is not yet down to the Circuit Court of Appeals nor from the Circuit Court of Appeals down to the District Court in Illinois. So I am minded to do this—to enter an order right now extending this temporary restraining order within the statute for a period of ten days to give the court a chance to see what there is in this record. If you want to present any views in writing during that period or to file additional affidavits, and do it within a reasonable time, you may do so. If I reach the conclusion that we are not asked to do the absurd thing of reviewing the judgment of the District Court and the appellate courts but have an issue here that is distinctly and substantially different from that already decided, then I will be forced to appoint a sepcial master to take testimony and continue this hearing, because the issue is too momentus to be forced too rapidly, and we simply cannot take it over. If I reach the contrary conclusion, the plaintiff has its rights of review I think the court has some latitude of discretion here that permits me to do this, and that is the course I will take with it."

It was then five p. m. wherefore the typing of the order then orally made was deferred until the next day. When prepared on the morning of the 20th, it was entered as of the day it was actually promulgated. It is not to be overlooked that this order was not objected to or excepted to by counsel for the defendant, although ample opportunity so to do was afforded.

Second, On page 10 of the petition to show cause occurs this language:

> "14. That said District Court for the Northern District of Ohio, Western Division, has announced

that it is the intention of the court to continue said temporary restraining order in force, and to appoint a special master to take oral evidence upon said motion for a temporary injunction."

This statement is so misleading as to be untrue in substance. The only announcements this court ever made bearing affirmatively upon the subject matter were purely subjunctive. There were two. The second is in the language quoted just above. The first occurred earlier in the same discussion. Counsel for plaintiff had asked the fixing of time to supplement affidavit testimony already in with oral testimony. The court said to counsel for the plaintiff:

"The court: Mr. Welles, I cannot do that without appointing a master. I cannot do it myself, nor can my associate, Judge Westenhaver, do it. We were endeavoring this afternoon to make some estimate of the time that the pending trial will consume, and I would be highly gratified if we finish it by the first day of March. It will certainly take the most of February. If you are going to ask for oral testimony, I will be forced to appoint a special master."

and subsequently to Mr. Zane ofr the defense:

"Now, if it is apparent on the face of the record that all there is here is, is as you say, an attempt to review what has hapened in Chicago, of course that will end it very quickly. We won't do that. Won't attempt to do that. The plaintiff in this case has had its day in court on the issues that were decided in Chicago, and it cannot regain lost ground by any such an application as this. But if it were defeated in that litigation because of impositions upon the court which decided against it, that is a decidedly different issue. And the issue is altogether too important to be decided without

456 recourse to every source of information that will enlighten the court.

I think I ought to perhaps scrutinize the petition again—I read it at the time the temporary restraining order was issued—to read it in the light of your answer to resatisfy the court's mind, if that can be done, that there is an issue here distinct from the issues decided in Chicago, before the question of the appointing of a special master is fully determined upon. But it seems to me that we have no refuge now, nothing to do now, but to appoint a special master to assist the court in the exigencies that are before it, if there is an issue separate from the issue decided in Chicago, and if the complainant, as it does, insists on carrying further its application for a temporary injunction. It seems to me these are largely matters left to the discretion of the court by the statute itself. The statute has some reservations in it. It says we must proceed as expeditiously as the interests of justice require. That leaves something to the discretion of the court."

If anything at all is plain on the record of this cause, it is the purpose of the court, reiterated orally and formally, to be most careful in not only observing the obligations of comity toward the courts of the Seventh Circuit, but to avoid holding here for decision a question already finally decided between the parties.

It is confidently expected that when these matters of mis-statement are brought to the attention of counsel for the defense, suitable action will be taken to insure, on the part of the honorable Circuit Court of Appeals of the Seventh Circuit, a correct understanding of our position, and that later we will be assured that they were wholly unintentional.

February 13, 1922.

JOHN M. KILLITS,
District Judge.

457 And afterwards, to-wit: On the eighteenth day of February, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to-wit:

Saturday, February 18, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the rule to show cause heretofore set down for hearing on February 21, 1922, be, and the same is hereby continued until March 7, 1922.

And afterwards, to-wit: On the seventh day of March, 1922, in the October term aforesaid, there was filed in the office of the clerk of this court a certain answer of the Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company to the petition of the Computing Scale Company, which said Answer is in the words and figures following, to-wit:

458 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Answer of the Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company to the Petition of the Computing Scale Company.

Miller, Starr, Brown, Packard & Peckham, Marshall & Fraser, Solicitors.

Filed Mar. 7, 1922.
EDWARD M. HOLLOWAY,
Clerk

459 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Answer of the Fidelity & Deposit Company of Maryland and the United States Fidelity & Guaranty Company to the Petition of the Computing Scale Company.

The Fidelity & Deposit Company of Maryland, and the United States Fidelity & Guaranty Company, appearing solely in response to the order of this court entered on February 10, 1922, and in no way appearing generally, but only to respond to answer so much of the order to show cause as relates to them, respectfully show:

1. The nature of the controversies and suits between the Toledo Scale Company and The Computing Scale Company are fully
460 exhibited to this court by the pleadings and exhibits filed by said parties and are referred to by these respondents for the purpose of showing the court the situation in which these respondents have become involved by reason thereof.

2. They respectfully show that they have at no time resisted liability upon the supersedeas bonds given to secure the performance of the decree in favor of The Computing Scale Company, and on the contrary they have at all times stood ready and now stand ready to make payment of said bonds whenever it shall be finally adjudged and determined that by making payment these defendants will be released and discharged from all obligation and liability of every nature to the Toledo Scale Company and The Computing Scale Company, and the Banks and Trust Company involved in said litigation.

After the filing of the suit of the Toledo Scale Company in the District Court of the United States, for the Northern District of Ohio, against The Computing Scale Company, these respondents and others, these respondents referred the matter through their general agents in Toledo to their regularly listed counsel, that is to say, to counsel whose names were, and for several years have been on a list which the agents were required to use in the event it became necessary to consult counsel in any matter or to appear in any suit, action or proceeding.

Counsel for these respondents so selected made an examination of bill of complaint, pleading and proceeding in the suit of the Toledo Scale Company vs. The Computing Scale Company, and were of the opinion that on the face of the bill of complaint of the

Toledo Scale Company a cause of action was presented, and that said cause of action could not be presented to this honorable court, or to the District Court of the United States, for the Northern
461 District of Illinois, Eastern Division, by way of a bill of review.

Said counsel made an examination of the facts bearing upon the interest and connection of the several Banks, Trust Company and these respondents in matters set forth in the bill of complaint of the Toledo Scale Company, and were of the opinion that said Banks, Trust Company and these respondents were proper parties to the bill of complaint of the Toledo Scale Company, and that the rights and interests of these respondents could only be protected by answering said bill of complaint and petitioning for affirmative relief, that is to say, by filing an answer in the nature of a cross bill praying for an interpleader.

These respondents show that The Summit Trust Company, as Trustee for said Banks, holds a large amount of property as security for the obligations of the Toledo Scale Company, created for the purpose of providing security and indemnity to these respondents against loss on account of the execution of the supersedeas bonds referred to, and that in certain contingencies The Computing Scale Company would have the right to resort to and compel the application of the property and security held by these respondents and the property and security held by The Summit Trust Company, and the said Banks.

By reason of the premises counsel for these respondents were of the opinion and are now of the opinion that their answer in the nature of a cross bill for interpleader presented a case under Sections 62, 64 and 63 of the Judicial Code of the United States, and they accordingly filed said answer in the nature of a cross bill, and instead of resisting liability upon the supersedeas bonds as claimed and alleged by petitioner, they prayed for a decree permitting
462 them to make payment in court, and praying that upon such payment being made, they might be relieved from all obligation and liability to the parties.

These respondents are advised that if the cause of action set forth in their answer exists, as they are advised does exist, petitioner may not properly charge that said answer was collusively filed or that it was filed pursuant to an understanding.

3. These respondents admit that The Computing Scale Company has moved to dismiss their answer or petition for affirmative relief and show that the petitioner has not brought said motion to the attention of the Distdict Court of the United States, for the Northern District of Ohio, Western Division, and that said court has not decided or determined the questions presented by said motion to dismiss.

4. Respondents further show that since the filing of the petition herein the District Court of the United States, for the Northern District of Ohio, Western Division, has rendered a decision and has entered a temporary injunction against The Computing Scale Company, and has found, among other things, that the bill of com-

plaint of the Toledo Scale Company states a cause of action, that upon the showing made the Toledo Scale Company is entitled to a temporary injunction as prayed for, and that said court has jurisdiction of the parties and of the subject matter, and that The Computing Scale Company has appeared in said court and cause and is subject to its jurisdiction.

By reason of the premises these respondents cannot be exonerated from all obligation and liability to the two scale companies and to the banks, and trust company, save and except by the decree of the court having jurisdiction of all of said parties.

463 5. These respondents admit that this court has had and still has jurisdiction of this cause with full power to receive and consider any petition or application, or bill of review, but they are advised that this court has not jurisdiction of a petition, bill or other application upon the grounds and facts set forth in the bill of complaint of the Toledo Scale Company filed in the District Court of the United States for the Northern District of Ohio, Western Division, and they deny that the filing of the answer of these respondents in said suit in Ohio was in any respect intended to be a fraud upon the jurisdiction of this court, or a pretended suit for relief, or an abuse of the order of this court, or a contempt of the powers and authority of this court.

6. These respondents are advised that this court should not include in its mandate a direction to the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter summary judgment on these respondents' supersedeas bonds, that such order would be a violation of the constitutional right of these respondents to a jury trial, and that this court should leave The Computing Scale Company to proceed at law upon said bonds and that the right of these respondents to a jury trial should they desire to assert any defense to said bonds should not be abridged.

These respondents further show that they are advised that a summary judgment should not be entered against them in a court of equity wherein it is made to appear that another court competent to determine its jurisdiction has taken cognizance of a suit involving the liability or obligation of respondents to pay said supersedeas bonds.

7. Respondents respectfully show that they should not be involved in continuous and expensive litigation by reason of the
464 contentions and litigations between the Toledo Scale Company and The Computing Scale Company, that they should not be compelled by one court to make payment of said supersedeas bonds while they are at the same time subject to the orders, injunctions and decrees of another court, that they should not be compelled to stand obligated upon said supersedeas bonds indefinitely pending such litigation as the Toledo Scale Company and The Computing Scale Company may see fit to bring or prosecute, but on the contrary, as sureties willing to pay said supersedeas bonds when

by so doing they will be fully released from the claims and demands of all parties, they are entitled to the protection of this court and of the District Court of the United States for the Northern District of Ohio, Western Division.

Respondents further say that they should not by the order of this court be placed in a position where if they fail to obey such order they will be in contempt of this court or of the District Court for the Northern District of Illinois, Eastern Division, while if they obey such order they will be in contempt of the District Court for the Northern District of Ohio, Western Division, and respondents say that that is the position in which they will be if an order of the character mentioned in the order to show cause herein is included in the mandate of this court.

They respectfully show that they are advised that no cause exists for enjoining them from further proceeding upon their petition to interplead, and that no cause exists for directing the entry of summary judgment upon supersedeas bonds, that no cause exists for the granting of any relief to The Computing Scale Company against these respondents herein.

465 Wherefore respondents pray that said order to show cause may be discharged as to them and that no order affecting them be included in the mandate of the court.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
UNITED STATES FIDELITY AND GUARANTY COMPANY.
MILLER, STARR, BROWN, PACKARD & PECKHAM,
MARSHALL & FRASER,
Solicitors.

EDWARD OSGOOD BROWN,
E. J. MARSHALL,
Of Counsel.

STATE OF OHIO,
County of Lucas, ss:

Badger C. Bowen being first duly sworn says that he is the President of The Welles-Bowen Company, General Agents of the Fidelity and Deposit Company of Maryland; that he is duly authorized in the premises, that he has read the foregoing answer and knows the contents thereof and that the same are true except as to the matters therein stated on belief and such matters he believes to be true.

BADGER C. BOWEN.

Subscribed and sworn to before me this 1st day of March, A. D. 1922.

ALONZO C. RUIHLEY,
Notary Public, Lucas County, Ohio.

466 And afterwards, on the same day, to-wit: On the seventh day of March, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 7, 1922.

Court met pursuant to adjourment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Julian W. Mack, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Robert R. Levy, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that leave be, and the same is hereby granted counsel for appellee to file a certified copy of the order of the Supreme Court of the United States denying a writ of certiorari in this cause.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the Petition of The Computing Scale Company for an order adjudging the Toledo Scale Company to be in contempt of this court and for a restraining order to be issued

against the said Toledo Scale Company and the Fidelity and
467 Deposit Company of Maryland and the United States Fidelity and Guaranty Company, and for other relief, Answers of respondents, and on briefs of counsel and on the oral arguments by Mr. John M. Zane, counsel for The Computing Scale Company, in support of said petition, and by Mr. George D. Wells and Mr. Horace Kent Tenney, counsel for Toledo Scale Company, and by Mr. Edward O. Brown, counsel for the Fidelity and Deposit Company of Maryland, et al., in opposition thereof, and the court having heard the same takes this matter under advisement.

It is further ordered that leave be, and the same is hereby granted counsel for the Fidelity and Deposit Company of Maryland, et al., to file a brief by Monday next.

And afterwards, to-wit: On the twenty-fifth day of March, 1922, in the October term aforesaid, there was filed in the office of the clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

468 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1921, January Session, 1922.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

On Petition of Computing Scale Company to Enforce Final Decree.

Before Baker, Mack, and Evans, Circuit Judges.

BAKER, *Circuit Judge,* delivered the opinion of the court:

Computing Company's patent was granted in 1895 and expired in 1912. Toledo Company's infringement began in 1906 and continued throughout the life of the patent. Suit was begun in a District Court in Ohio in 1906 and Toledo Company answered that the patent was void by reason of prior patents and prior public use. In 1910 the present suit was instituted, and as a condition for extending time for taking evidence the court below required Computing Company to dismiss its Ohio suit. In answering the bill in this suit Toledo Company averred anticipation by reason of earlier patents, among them patent 106,869 granted to William H. Phinney in 1870; and further averred anticipation by reason of prior public use and sale "by various persons at various places within the United States, and among others at Pawtucket, Rhode Island, by William H. Phinney, then and now, as defendant is informed and believes, residing at said Pawtucket." Additional instances of alleged prior use and sale were also set forth.

So far as the validity of the patent was concerned Computing Company pleaded a good case by setting forth its grant from the government; and thereupon Toledo Company was obliged
469 to plead one or more of the affirmative defenses permitted by statute. So far as meeting its duty to go forward with proofs was concerned Computing Company made a good prima facie case by introducing the patent and proving Toledo Company's infringement. Toledo Company introduced many prior patents and a large amount of evidence relating to alleged prior uses and sales, but none relating to the alleged prior use and sale by Phinney at Pawtucket. By its decree of June, 1912, sustaining validity and finding infringement, the court below necessarily decided that Phinney had neither used nor sold anything that could impair the patent.

In April, 1913, this court affirmed the decree of validity and infringement. Prior to the argument Toledo Company moved to have the cause remanded to the court below with the direction to open the decree and receive newly discovered evidence relating to the alleged prior use by Phinney. This motion was overruled. In May, 1913, before our mandate had gone to the court below, Toledo Company filed another motion to the same end, referring to accompanying affidavits and exhibits for the facts that would require this court, in the interests of justice, to annul its affirmance of validity and infringement and direct the lower court to receive the new evidence and in the light thereof to decide afresh the issue of validity. This motion was also overruled.

During the accounting before the master Toledo Company took depositions concerning Phinney's commercial practice, filed them together with identified Phinney exhibits, and, insisting that the decree of validity was not in any sense determinative of that issue, contended that the new evidence entitled it to prevail on the issue of validity. The master, and likewise the court below on exceptions to the master's report, ruled that they had no authority to depart from this court's mandate which they were engaged in executing.

On appeal from the accounting decree, — Fed. —, Toledo Company again presented to this court its contentions respecting the Phinney testimony and exhibits. We ruled that the decree of validity and infringement was so far final in its essence as to preclude the court below and this court from deciding the issue of validity anew unless that decree should first be opened. Treating the matter as a petition in the nature of a bill of review, we held that the showing on its face disclosed a lack of reasonable diligence and no sufficient excuse for that lack.

470 After affirming the accounting decree in October, 1921, this court, on Toledo Company's motion, entered an order staying the issuance of the mandate pending the decision of the Supreme Court on petition for writ of certiorari. By virtue of that order the cause is still pending in this court.

On January 9, 1922, the Supreme Court denied the petition for writ of certiorari. — U. S. —. On the same day Toledo Company

filed a bill in the District Court of the United States for the Northern District of Ohio, Western Division, to enjoin Computing Company from taking any steps to enforce the decree of the court below as affirmed by this court, and that court on the same day issued a restraining order. On February 10, 1922, Computing Company filed in this court its petition for a rule (and on the same day the rule was issued) upon Toledo Company to show cause why it should not be enjoined from maintaining the bill in Ohio and why it and its sureties on supersedeas bonds should not be ordered to pay the decree. On February 13, 1922, the Ohio court issued a preliminary injunction.

In its petition Computing Company avers the proceedings in this court and in the court below as above narrated and also the bill and proceedings in the Ohio court. In its response Toledo Company sets up the Ohio bill and the proceedings thereon; and the Ohio bill itself exhibits the prior proceedings in this circuit.

As grounds for claiming that Computing Company should be enjoined from collecting the accounting decree, the Ohio bill alleged:

1. Since 1901 Computing Company has endeavored to monopolize the computing scale business, and formed a conspiracy to which its officers and agents were parties to drive Toledo Company out of business.

2. In 1902 and some subsequent years Computing Company built and sold a dishonest scale. Toledo Company exposed the fraud in public circulars. Computing Company unsuccessfully sought to enjoin the distribution of the circulars. This increased Computing Company's malicious hatred.

3. Between 1902 and 1905 Toledo Company built a so-called "fan" scale. Computing Company brought suits for infringements of its patents (other than the patent here in suit) and finally dismissed them without trial.

4. In 1901 Computing Company brought suit in the Eastern District of Pennsylvania to enjoin Federal Company from in-
471 fringing this patent. Federal Company took depositions relating to the Phinney commercial practice and introduced three Phinney scales in evidence. By stipulation each side retained possession of its own proofs and exhibits. The Phinney exhibits were later turned over by Federal Company's counsel to Computing Company's counsel who had them in possession until after the court below in this suit had tried and decided the issue of validity. Finally the Federal case was dismissed because, as Toledo Company alleges, Computing Company was advised by its then counsel that the Phinney practice was a dangerous defense and would probably defeat the suit.

5. Similar prior suits against Randall in the Eastern District of Pennsylvania and against Standard Company in the Eastern District of Wisconsin were dismissed after similar evidence of the Phinney practice was brought forward by the defendants.

6. After 1906 and before the court below decided the issue of validity Computing Company secretly purchased and took into its possession all the Phinney scales it could get, being all of the twenty scales Phinney ever made except one or two then in the hands of users and except those in possession or control of defendants in the Federal, Randall, and Standard suits. Such purchases were made by Computing Company "in pursuance of said conspiracy," "secretly," and "fraudulently," for the purpose of preventing Toledo Company and the court below and this court from learning of the Phinney commercial practice.

7. Toledo Company made diligent investigations to find the Phinney commercial practice and Computing Company's fraudulent suppression of evidence thereof. (But never went to Pawtucket until after the trial in June, 1912.) While Toledo Company has had knowledge of the Phinney commercial practice since 1912, it had no knowledge of Computing Company's fraudulent suppression of evidence thereof until December 20, 1921, which was after the affirmance of the accounting decree. And so Toledo Company has never had the opportunity to present to any court the true facts with respect to the Phinney sale and use, and has had no hearing on Computing Company's fraudulent conduct.

From the foregoing synopsis of Computing Company's petition and Toledo Company's response it is evident that a conflict of jurisdiction is involved. Of course the District Court in Ohio would not enjoin Computing Company from proceeding in this court
472 and the court below to enforce the accounting decree, unless that court felt constrained by the rules of law and equity to exercise such a jurisdiction. And likewise this court would not entertain the present petition and response, if it did not believe that the duty so to do was inevitably cast upon it. In this situation the course, if open, that would seem most consonant with our respect for the District Court in Ohio would be for us to certify the question to the Supreme Court. But inasmuch as we deem that the ultimate question can not be answered without considering and weighing the recorded facts in the two courts, and inasmuch as that would require the transmission to the Supreme Court of the entire record, we find that the above suggested course is not available. Graver v. Faurot, 162 U. S. 435. If, however, our answer is wrong, the question can be presented to the Supreme Court by petition for writ of certiorari.

In taking up the question we will endeavor to bear in mind throughout that the Ohio bill is not before us on demurrer, nor is the temporary injunction here on appeal. We have no jurisdiction to entertain a direct attack. Unless Computing Company's petition can prevail over Toledo Company's response as a collateral attack, our duty would be to dismiss Computing Company's petition for want of jurisdiction.

If the Ohio record, which fully embodies our record, demonstrates that the material issues there tendered were within the exclusive jurisdiction of this court, it seems to us that Computing Company's collateral attack should be adjudged successful.

If the Ohio record discloses only a bill of review or a petition in the nature of a bill of review (National Brake Co. v. Christensen, 254 U. S. 425) or a petition for rehearing (Simmons Co. v. Grier Bros. Co., — U. S. —, February 27, 1922), then this is the only court with proper warrant now to consider the question.

True, Computing Company might stand on its answer in the Ohio court that the matter there tendered by Toledo Company had been finally adjudicated in this court or was pending within this court's exclusive jurisdicton. But a party who has a final decision in his favor is not compelled to permit his adversary to relitigate the same matters in another court. Kessler v. Eldred, 206 U. S. 285; Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356 (in pursuance of which decision the District Court on the ancillary bill en-
473 joined the defendants therein from maintaining in the State courts their suits in which the State courts had jurisdiction of the parties and a general jurisdiction of the subject matter).

Cases last above cited involved ancillary proceedings in District Courts. But if the final decree had been removed to and was pending in a Court of Appeals, that court would have not only exclusive jurisdiction of the questions presented on the record transmitted by the trial court, but also exclusive jurisdiction of ancillary questions presented by independent evidence and bearing on the correctness and justice of the mandate to be entered. Has the issue decided by the trial court now become moot? Has the appellant so availed himself of the decree as to require the dismissal of his appeal? Has new evidence bearing on the issue been discovered, on account of which equity demands that the decree be opened and a new trial had on evidence including the new? Is the appellant privy to an adjudication in another court which should bar the appeal? Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, and National Brake Co. vs. Christensen, 254 U. S. 425, are illustrative of the ancillary appellate jurisdiction.

If Computing Company's petition is in fact "ancillary to the original jurisdiction invoked," then the present proceeding is "still in its essence and nature a suit involving the validity of a patent." National Brake Co. v. Christensen, 254 U. S. 425, 433.

On the other hand, if Computing Company's petition is not ancillary to our original jurisdiction, and if Toledo Company's proceeding in the District Court in Ohio is in fact an original and independent bill to annul a decree in the hands of Computing Company on account of extrinsic fraud in its procurement, then we agree with the Ohio court that it has a jurisdiction which we must respect.

At the argument the ultimate contention of Toledo Company's counsel was that Toledo Company had never had an opportunity to present to any court the true facts with respect to the Phinney prior commercial practice; that Toledo Company had never had a hearing on Computing Company's fraudulent conduct; that Toledo Company was therefore entitled to have the District Court in Ohio decide whether Computing Company's conduct was fraudulent, and, if so found, then to proceed to decide whether Computing Company's patent was void in view of the prior art including the Phinney prac-

tice. Thereupon we inquired of counsel whether the fraud
74 alleged in the Ohio bill afforded no way for Toledo Company to avoid payment of the accounting decree except by securing
n adjudication that the patent was void in view of the Phinney
ractice; and counsel answered that such was the only way. Now
happens that the District Court in Ohio has general jurisdiction
decide the issue of the validity of a patent. But if counsel's no-
on of what really constitutes an original and independent bill is
orrect, then any State court having general jurisdiction in equity
ould have equal authority to entertain the bill, find fraud in the
rocurement of the original decree of validity, and then finally ad-
udge invalidity. Similarly a State court, on a bill alleging fraud
n the procurement of an adjudication of bankruptcy, might adjudge
hat the defendant in the Federal court was not a bankrupt. Thus
ould be created a right of removal of causes in reverse.

It is only extrinsic fraud that furnishes a basis for the independent
ill. And since such an independent bill is cognizable by any court
f equity, State or Federal, extrinsic fraud must be fraud of such a
haracter as to enable the secondary court (a State court, for ex-
mple), to annul the decree of the primary court (a Federal court,
or example) without trying the original case which might be of ex-
lusively Federal cognizance. As illustrative of extrinsic fraud the
implest case that occurs to us is this: A sues B in a Federal court for
nfringement of a patent. A procures the marshal to serve X and to
eturn that he has served B. X appears and a trial results in a decree
f infringement and damages against B. B first learns of the fraud
when the marshal levies on his property. B thereupon files his in-
dependent bill against A in a State court. On proof of the facts the
State court annuls the Federal decree by enjoining A from taking
ny steps to enforce it. Here the fraud was extrinsic to any trial
f the patent suit between A and B; the fraud constituted the entire
basis of the State court's decree; the State court did not try validity
or infringement or damages; A was left in possession of his original
cause of action; and if A fails in a new infringement suit against
B on account of loss of important evidence in the meantime or be-
cause B has in fact a good defense, he has only himself to blame.

Extreme cases frequently afford the clearest exposition of a prin-
ciple. As the facts approach the border line, difficulties and
475 contrarieties of opinion may arise concerning the application, but the principle as such remains unaltered.

Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524 (6th C. C. A.), Graver v. Faurot, 76 Fed. 257 (7th C. C. A.), and Chicago etc. Ry. Co. v. Callicotte, 237 Fed. 799 (8th C. C. A.), all were cases in which on the respective states of facts the courts found extrinsic fraud as distinguished from intrinsic fraud.

A true definition of intrinsic fraud should demonstrate what extrinsic fraud is not, and should draw the line of demarcation between the two. United States v. Throckmorton, 98 U. S. 61, is in our judgment the authoritative precedent which we must follow. We find nothing in Barrow v. Hunton, 99 U. S. 80, Johnson v. Waters, 111 U. S. 640, Marshall v. Holmes, 141 U. S. 589, and Wells, Fargo

& Co. v. Taylor, 254 U. S. 175, to indicate any intention of the Supreme Court to depart from the principles and definitions in the Throckmorton case.

From that case we deduce that intrinsic fraud is any fraudulent conduct of the successful party which was practiced during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his injury after he announced that he was ready to proceed with the trial. If during an actual adversary trial the successful party uses forged instruments, or perjured testimony, or fails to introduce witnesses of whom he has knowledge and whose testimony would help his adversary and impair his own case, he is guilty of fraud; but it is intrinsic fraud, for relief from which application must be made to the court having jurisdiction of the issues joined and tried. And that tribunal will of course grant prompt and adequate relief unless the laches or negligence of the applicant prevents.

From the Throckmorton case we also deduce that extrinsic fraud is any fraudulent conduct of the successful party which was practiced outside of an actual adversary trial (if there ever was one) and which was practiced directly and affirmatively on the defeated party (or his agents, attorneys, or witnesses) whereby he was prevented from presenting fully and fairly his side of the case. If the successful party, by fraud or deception practiced on his opponent, keeps him in ignorance of the suit, or falsely represents that he is merely a nominal party against whom no relief is sought, or lulls his vigilance by a false promise of compromise, or kidnaps his witnesses,
476 or seduces his attorney, or procures an attorney without authority to represent him in court, he is guilty of fraud; and inasmuch as the fraud is extrinsic, that is, a fraud not practiced upon the trial court and the opponent during the course of an actual adversary trial of the controversy between the parties, any court of equity has power to annul the decree so obtained.

Applying these principles and definitions to the recorded facts before us, we find:

Toledo Company as an affirmative defense alleged a prior sale and use by Phinney at Pawtucket, Rhode Island. Issue was joined by a reply in denial. When the case was called for final hearing on the issues of validity and infringement, both parties responded that they were fully prepared for trial. An actual adversary trial was had. It was hotly contested. There was a voluminous record on the merits of the patent. On that record the court below adjudged validity and infringement. In Toledo Company's Ohio bill and its response here, fraud on the part of Computing Company is alleged. Those allegations we accept at face value, though flatly denied by Computing Company. (But we pass by the adjectival, adverbial and collateral denunciations and regard only the substantive acts.) Before, at the time of, and during the trial, Computing Company by reason of the Federal, Randall, and Standard suits, and by reason of its investigations and purchases at Pawtucket, had full knowledge of the alleged Phinney commercial practice. Toledo Company, as Computing Company could see and know during the trial, had no

uch knowledge. Nevertheless Computing Company permitted the earing of evidence to be closed without informing Toledo Company nd the trial court that there were witnesses who could testify and xhibits at Pawtucket and elsewhere (some in its own factory) which ould be introduced in evidence as to the bearing of the old Phinney cales upon the validity of Computing Company's patent.

Such a withholding or suppression of evidence, though less niquitous than the affirmative use of forged documents, false exibits, and perjured testimony, runs counter to one's sense of ideal air play. Our judicial processes have advanced from determining ontroversies by wager of battle until courts now endeavor to learn he truth and to base their decrees thereon. If intrinsic fraud is practiced, fair play is satisfied by having a new and fair trial in the same court. But what is the truth of the controversy?
477 Courts can judge only from the evidence before them. And if a second court may annul the decree of the first court because that decree is found by the second court to have been obtained through forged documents, or false exhibits, or perjured testimony, or withholding or suppression of known evidence, then a third court may annul the second court's decree of annulment by like means; and so on. Higher than any private good that could come from such second or subsequent decrees is the public good that was emphasized in the Throckmorton case. Interest rei publicæ ut sit finis litium.

That Toledo Company's allegations show only an intrinsic fraud is a conclusion that is reinforced by considering them also from the other point of view, namely, that of extrinsic fraud.

Computing Company made no representations, false or otherwise, to Toledo Company concerning the state of the evidence. There was no deception or misleading of Toledo Company by any conduct of Computing Company. Between these parties the only contact was in open court from opposite sides of the counsel table.

Computing Company's alleged fraudulent conduct in withholding and suppressing evidence known to it was not the proximate cause, or any cause, of Toledo Company's failure to introduce at the trial any evidence in support of its affirmative defense based on the alleged prior sale and use by Phinney at Pawtucket. Computing Company nevered manœuvered Toledo Company into staying away from Pawtucket. Nor procured Phinney to lie to Toledo Company about what he had and to refuse to show Toledo Company the scales in his possession. Nor attempted to induce the users of Phinney scales in and about Pawtucket to conceal them and deny their existence. Nor made it a condition of any of the alleged purchases that the sellers keep silent. Nor endeavored to have the comparatively few competitors of these parties in the automatic computing scale business withhold their knowledge of the prior art. Nor solicited the judges, clerks, parties and counsel in the Federal, Randall, and Standard suits to suppress the records.

At the argument of this matter Toledo Company properly admitted in open court that the exhibits which have been in its possession since sometime prior to May, 1913, bring out the question of ma-

teriality of the alleged now evidence on the issue of validity as fully as would additional samples of the same Phinney scales. So it seems quite clear to us that proof of Toledo Company's single new
478 allegation of fact respecting diligence, namely, that it did not learn until December 20, 1921, that Computing Company in 1906 began to gather up all the Phinney scales that were purchasable, does not affect the situation. Computing Company's alleged purchases did not prevent Toledo Company from securing abundant examples of the Phinney scales prior to May, 1913. During Toledo Company's challenged infringement for six years preceding the trial in June, 1912, any investigation in and about Pawtucket and in the offices of clerks and counsel where other makers of automatic computing scales were suable on Computing Company's patent, would have brought forth even more of the Phinney scales.

We believe that the petition and response now before us require us to formulate a mandate which to our view will do justice between these parties. Although Toledo Company's response does not contain a prayer for the opening of the final accounting decree, the subject matter invites our attention as if a cross-petition had been filed.

After we affirmed the decree of validity and infringement in April, 1913, Toledo Company in May came in with a motion in the nature of a bill of review on account of newly discovered evidence, the Phinney scales. Though the trial court's decree of validity was rendered upon a "final hearing" of the merits of the patent, that decree was not the final decree in the cause. And our decree of affirmance was no more final than the trial court's decree. But our "decree evidenced a quasi-definitive decision which, if nothing occurred to prevent, would in due course be carried into the final decree." Simmons Co. v. Grier Bros. Co., — U. S. —. Nothing to prevent in the way of newly discovered evidence could be originated in the trial court, for that court had no authority except to proceed with the accounting in pursuance of our mandate. So no new evidence bearing on the merits of the patent could prevent the decree of validity from being carried into the final accounting decree except on a motion or petition in the nature of a bill of review presented in this court for our consideration and action under our ancillary appellate jurisdiction. And if our decree affirming validity was quasi-definitive, was so far final that it would inevitably be carried forward into the final decree on accounting, unless opened by us, then our action in dismissing the proposed bill of re-
479 view because it showed want of equity on its face was final in the same sense. Compare Embry v. Palmer, 107 U. S. 3, last paragraph of page 17.

Nevertheless Toledo Company, without calling our attention at any time between 1913 and 1921 to any injustice in the trial of the issue of validity, put into the accounting record the same facts in the form of depositions that had been presented to us in 1913 by affidavits, and identified the same exhibits. Thus in the record on appeal from the accounting decree was again presented a proposed bill of review on account of newly discovered evidence. We

d that, even if our order of dismissal in 1913 was not a bar, the
owing, considered as a petition in the nature of a bill of review,
s bad on its face, and again dismissed it for want of equity. In
ging why our action should be otherwise, counsel then represent-
Toledo Company, not the counsel who filed the Ohio bill and
present response based thereon, stated in their brief: "To refuse
consider the evidence in the present record respecting the Phin-
scale, as affecting the validity of the patent in suit, would be
permit the plaintiff to take advantage of its concealment of essen-
facts known to it and unknown to the defendant or the court
its consequent imposition on both." That this was a correct
mmation of the effect of the showing, as contrasted with present
nsel's assertion that Computing Company's alleged fraudulent
ncealment of evidence was not involved, is demonstrated by an
amination of the affidavits and depositions filed in support of the
tions to open the decree of validity. One example will suffice.
om the 1913 affidavit of Thomas Phinney, son of the grantee of
Phinney patent of 1870 and successor to his father's business:
'he three scales I before mentioned as having been assembled by
out of parts turned over to me by my father were sold one at a
ne to the same individual, whose identity I do not know. Some
een years ago he first applied for a scale, representing to me that
was from Connecticut and desired the scale for the use of the
ocers and Butchers' Association of Connecticut. About a year
er he appeared again and I sold him a second scale of this same
nd. Upon this occasionI asked him if he hadn't taken the first
le up to Boston and used it in connection with the business of
e Boston Computing Scale Company. He admitted that he had
me connection with that company, but stated that he was out of
and wanted another scale to use in some other connection. I
sold him one and he returned again about a year later and
0 I sold him a third scale. * * * I have recently made
repeated efforts to locate one of the scales which were put
regular use at places of business where my father sold them,
t I have been unable to locate a single one of them. I believe
ey were all gathered up some ten years ago in connection with
e same litigation with reference to which I loaned Mr. Howson
y scale." Mr. Howson, so referred to, was counsel of Federal
mpany, sued as hereinbefore stated by Computing Company.
ston Company, so referred to, was Computing Company's prede-
ssor in title and interest in the business built upon the patent
suit, which fact was made known to Toledo Company by evi-
nce in this suit prior to the trial court's decree of June, 1912. So
e believe that Phinney's testimony afforded a fair basis for Toledo
mpany's former counsel's contention that Computing Company
d gathered in all the Phinney scales it could find and get pos-
ssion of and had concealed and suppressed them as evidence. But
such is not a fair interpretation of Phinney's testimony, it at least
ows that Toledo Company had continuously in its hands the
read which if followed, would have led to Computing Company's

lair, which Toledo Company's present counsel allege was first discovered on December 20, 1921, after the affirmance of the accounting decree.

Computing Company's petition discloses that the same contentions respecting the showing of newly discovered evidence were urged by Toledo Company's former counsel upon the Supreme Court in support of the petition for writ of certiorari.

During the eight years between our affirmance of the decree of validity and our affirmance of the final decree on accounting, Toledo Company, with the aforesaid facts and clews in its possession, and without applying to this court as the only court having authority to grant relief for newly discovered evidence which might make an accounting unnecessary, engaged Computing Company in a prolonged accounting contest which involved great labor and expense.

While Toledo Company's former counsel were urging upon the Supreme Court, as a sufficient excuse for lack of reasonable diligence, the alleged fraudulent conduct of Computing Company in purchasing, concealing and suppressing some of the Phinney scales,

Toledo Company's present counsel were engaged in preparing the Ohio bill and having it ready to file the moment the contentions of the former counsel were denied.

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Respecting the surety companies that are made parties to Computing Company's petition, they by signing the supersedeas bonds as sureties made themselves parties to the cause and became subject to the same jurisdiction that controls Toledo Company. Empire State M. Co. v. Hanley, 136 Fed. 99; City of Clarksdale v. Williamson, 194 Fed. 412.

On the situation presented by the petition and response, we believe that equity requires the following action:

We now receive from Computing Company the certified copy of the Supreme Court's order denying Toledo Company's petition for writ of certiorari, and we direct the clerk to file it in this cause.

Unless the mandate which we now formulate be stayed on Toledo Company's motion filed within five days, the clerk is directed to issue and transmit to the court below the following mandate:

1. Enter of record our affirmance of the final decree on accounting.

2. Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill.

3. Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, but not exceeding the penalties of the bonds.

4. Ascertain Computing Company's expenses in this matter, including reasonable attorneys' fees, paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9, 1922, and enter summary decree therefor against Toledo Company, but not against the sureties on the supersedeas bonds.

So ordered.

A true Copy.
Teste:

____ ____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

482 And afterwards, on the same day, to-wit: On the twenty-fifth day of March, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to-wit:

Saturday, March 25, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Julian W. Mack, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the Petition of The Computing Scale Company for an order adjudging the Toledo Scale
483 Company to be in contempt of this court and for a restraining order to be issued against said Toledo Scale Company and Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, and for other relief, and on the Answers of the Toledo Scale Company, Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, briefs of counsel, and was argued by counsel.

On consideration whereof, It is now here ordered by this court that unless the mandate which is now here formulated be stayed on motion of Toledo Scale Company within five days from this date, the clerk of this court is directed to issue and transmit to the court below the following mandate:

1. Enter of record our affirmance of the final decree on accounting.

2. Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill.

3. Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, but not exceeding the penalties of the bonds.

4. Ascertain Computing Company's expenses in this matter, including reasonable attorney's fees, paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9, 1922, and enter summary decree therefor against Toledo Company, but not against the sureties on the supersedeas bonds.

483*a* And afterwards, to-wit: On the twenty-eighth day of March, 1922, in the October term aforesaid, there was filed in the office of the clerk of this court a certain Motion for Stay of Mandate, which said Motion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal District Court, Northern District of Illinois.

Now comes the Toledo Scale Company and moves the court for a stay of the mandate directed to be issued in pursuance of the opinion filed herein March 25, 1922 and represents to the court that its purpose in asking said stay of mandate is to obtain time within which to apply to the Supreme Court of the United States for the issuance of a writ of prohibition and mandamus or a writ of certiorari, whichever said court may deem proper in the premises—said application the Toledo Scale Company intends to present as soon as the papers and records can be prepared.

Respectfully submitted,

TOLEDO SCALE COMPANY,
By TRACY, CHAPMAN & WELLES,
BROWN, GEDDES, SCHMETTAU & WILLIAMS,
HORACE KENT TENNEY,
Attorneys for said Toledo Scale Company.

Endorsed: Filed Mar. 28, 1922. Edward M. Holloway, Clerk.

484 And afterwards, to-wit: On the twenty-eighth day of March, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 28, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Evan A. Evans, Circuit Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and the motion to stay the mandate in this cause now comes on to be heard on oral argument by Mr. Harry A. Parkin, counsel for appellant, in support of said motion, and by Mr. John M. Zane, counsel for appellee, in opposition thereto.

On consideration whereof, It is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court upon condition that appellant give an additional bond in the sum of Twenty-five Thousand Dollars ($25,000.00) as additional security to secure the payment of the decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered in this cause therein on March 5th, 1919, together with interest and costs. Said bond to be presented to counsel for appellee within fourteen (14) days from this date.

485 And afterwards, to wit: On the tenth day of April, 1922, of the October term last aforesaid, there was filed in the office of the clerk of this court a certain notice, which said notice is in the following words and figures, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Notice.

To John M. Zane,
Attorney for Appellee:

Please take notice that on Monday, the tenth day of April, 1922, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard, we shall appear before the Circuit Court of Appeals, or in case said court is not in session, before one of the judges thereof, in Chambers, and present to the court for its approval the additional bond in the sum of Twenty-five Thousand ($25,000.00) Dollars heretofore submitted to you; at which time and place you may be present and be heard if you see fit.

TENNY, HARDING & SHERMAN,
Attorneys for Appellant.

Received a copy of the above and foregoing notice this 8th day of April, A. D. 1922.

JOHN M. ZANE,
Attorney for Appellee.
H. W. N.

And afterwards, on the same day, to wit, On the tenth day of April, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

486 Monday, April 10, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the order heretofore entered in this cause in this court on Tuesday, March 28, 1922, be, and the same is hereby set aside, and that the following order be substituted and entered in lieu thereof nunc pro tunc as of the date of Tuesday, March 28, 1922:

Now this day come the parties by their counsel and the motion to stay the mandate in this cause now comes on to be heard on oral argument by Mr. Harry A. Parkin, counsel for appellant, in support of said motion, and by Mr. John M. Zane, counsel for appellee, in opposition thereto.

On consideration whereof, It is now here ordered that the mandate in this cause be, and the same is hereby stayed until April 25, 1922 upon condition that appellant give an additional bond in the sum of Twenty-five Thousand Dollars ($25,000.00) to secure the performance and for payment of all the provisions in said mandate if and when Toledo Company's proposed application to the Supreme Court for writ of certiorari, prohibition or mandamus, shall be denied. Said bond to be filed here by April 20, 1922. And if said application be filed on or before April 25, 1922, the issuance of the mandate be stayed until further order of the court.

487 And afterwards to wit: On the twelfth day of April, 1922 of the October term last aforesaid the following further proceedings were had and entered of record to wit:

Wednesday, April 12, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Geo. T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On this 12th day of April, 1922, come The Fidelity and Deposit Company of Maryland and The United States Fidelity and Guaranty Company, and move the court for a stay of that part only of the mandate of this court entered in this cause on March 25th, as orders the court below to enter a summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, which said motion is now granted, and said above stated part of the mandate is stayed till further order of the court.

488 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages, numbered from 1 to 487, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) on the Petition of The Computing Scale Company for an order adjudging the Toledo Scale Company to be in contempt of this court and for a restraining order to be issued against said Toledo Scale Company and Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, and for other relief, in the following entitled cause: Toledo Scale Company vs. The Computing Scale Company, No. 2784, October Term, 1921, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of April, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

489 & 490 In the Supreme Court of the United States.

No. 339, October Term, 1922.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

No. 388, October Term, 1922.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and UNITED STATES FIDELITY AND GUARANTY COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Stipulation.

It is hereby stipulated by and between Toledo Scale Company and Fidelity and Deposit Company of Maryland, United States Fidelity and Guaranty Company, and The Computing Scale Company, that the above entitled proceedings shall be heard upon one and the same printed record, and shall with the leave of the Court be heard together and argued as one case.

In witness whereof, said Toledo Scale Company, said The Computing Scale Company, said Fidelity and Deposit Company of Maryland and said United States Fidelity and Guaranty Company, by their respective duly authorized solicitors, have executed this stipulation this 14th day of June, 1922.

TOLEDO SCALE COMPANY,
By TRACEY, CHAPMAN & WELLES,
TENNEY, HARDING & SHERMAN,
BROWN, GEDDES, SCHMETTAN & WILLIAMS. *Its Solicitors.*
THE COMPUTING SCALE COMPANY,
By JOHN M. ZANE,
CHARLES F. MORSE,
DRURY W. COOPER, *Its Solicitors.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By EDWARD O. BROWN,
EDWIN J. MARSHALL,
CHARLES MARKELL, *Its Solicitors.*
UNITED STATES FIDLEITY AND GUARANTY COMPANY,
By EDWARD O. BROWN,
EDWIN J. MARSHALL,
CHARLES MARKELL, *Its Solicitors.*

491 & 492 [Endorsed:] Gen'l No. —. 388—28928. 399-8846. In the Supreme Court of the United States. Toledo Scale Company vs. The Computing Scale Company. October Term, 1922. No. 339. Fidelity and Deposit Company of Maryland and United States Fidelity and Guaranty Company vs. The Computing Scale Company and Toledo Scale Company. October Term, 1922. No. 388. Mr. Clerk: Please file. Edward Osgood Brown, Edwin J. Marshall, Charles Markell, Counsel for Fidelity & Deposit Co. of Md. and U. S. F. & G. Co. Brown, Packard, Peckham & Barnes, Successors to Miller, Starr, Brown, Packard & Peckham, 1522 First National Bank Building. Central 2150.

493 [Endorsed:] File Nos. 28846, etc. Supreme Court U. S. October Term, 1922. Term Nos. 339 & 388. Toledo Scale Company vs. Computing Scale Company. Fidelity & Deposit Co. of Maryland vs. Computing Scale Company. Stipulation to consolidate and that cases be heard on one record. Filed July 19, 1922.

494 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Toledo Scale Company is appellant, and The Computing Scale Company is appellee, No. 2784, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
495 Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Stipulation.

Whereas, Toledo Scale Company, on January 3, 1922, presented to the Supreme Court of the United States its petition for a writ of certiorari to review the above entitled cause and filed with said petition a transcript of the record herein consisting of three volumes certified to by the clerk of this court.

And whereas, thereafter further proceedings were had herein, and on May 15, 1922, Toledo Scale Company presented to the Supreme Court of the United States its petition for a writ of certiorari to review said further proceedings and filed with said petition a transcript of the record consisting of the proceedings had herein from February 10, 1922, to April 12, 1922, inclusive, certified to by the clerk of this court

And whereas, after said April 12, 1922, certain other proceedings were had in this cause,

And whereas, on June 12, 1922, the Supreme Court of the United States issued its writ of certiorari directing this court to send to it the records and proceedings in this cause,

Now, therefore, it is hereby stipulated by and between Toledo Scale Company and The Computing Scale Company, by their respective counsel, that the certified copies of the transcripts of record herein heretofore filed in the Supreme Court of the United States as aforesaid, together with the certified record of all proceedings had herein since said April 12, 1922, may be taken as the return to said writ of certiorari,

Provided that the clerk shall, upon the præcipe of either party, after ten days' notice to the opposite party, certify to the Supreme Court any or all exhibits identified in said transcripts and not included in said transcripts.

Dated July 13, 1922.

TENNEY, HARDING & SHERMAN,
TRACY, CHAPMAN & WELLES,
Solicitors for Toledo Scale Company.
JOHN M. ZANE,
DRURY W. COOPER,
Solicitors for The Computing Scale Company.

Endorsed: Filed July 17, 1922. Edward M. Holloway, Clerk.

496 *Return to Writ.*

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Toledo Scale Company, appellant, vs. The Computing Scale Company, appellee, No. 2784, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto, together with all the proceedings had and papers filed subsequent to April 12, 1922, which are certified and attached hereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this first day of August, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court, of Appeals for the Seventh Circuit.

[Endorsed:] File No. 28846. Supreme Court of the United States, October Term, 1922. No. 339. Toledo Scale Company vs. The Computing Scale Company. Writ of Certiorari. Filed Jul. 7, 1922. Edward M. Holloway, Clerk.

497 And afterwards, to-wit: On the nineteenth day of April, 1922, in the October term 1921, there was filed in the office of the clerk of this court a certain Notice, which said Notice is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Notice.

To Mr. John M. Zane,
Solicitor for Appellee:

Please take notice that on Wednesday, the nineteenth day of April, 1922, at the hour of two o'clock P. M., or as soon thereafter as counsel can be heard, we shall appear before the Circuit Court of Appeals, or if said court is not in session, before one of the Judges thereof in his chambers, and present to the court a motion, copy of which is hereto attached, at which time and place you may be present and be heard, if you see fit.

TRACY, CHAPMAN & WILLIS,
TENNEY, HARDING & SHERMAN,
Solicitors for Appellant.

Received a copy of the above and foregoing notice, this nineteenth day of April, 1922, at the hour of 11:30 A. M.

ZANE, MORSE & MARSHALL.
JOHN M. ZANE.

Endorsed: Filed Apr. 19, 1922. Edward M. Holloway, Clerk.

498 And afterwards, to-wit: On the same day, to-wit: On the nineteenth day of April, 1922, in the October term 1921, there was filed in the office of the clerk of this court a certain Motion, which said Motion is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Motion.

Now comes the Toledo Scale Company and represents to the court that on April 13, 1922, it presented a motion to the Supreme Court of the United States for leave to file a petition for a writ of prohibition and mandamus, directed to the Circuit Court of Appeals for the Seventh Circuit and the Judges thereof, with respect to the orders entered herein on the petition of the Computing Scale Company, filed herein February 10, 1922.

Toledo Scale Company further represents that on April 17, 1922 the Supreme Court made an order on said motion for leave to file said petition, "Denied without prejudice."

Toledo Scale Company further represents that it has prepared a petition for a writ of certiorari and a brief in support thereof, which said petition and brief will be filed with the Supreme Court of the United States on April 20, 1922, if the printing of same is completed in time, and in any event not later than April 21, 1922, and that it intends to notice said petition for hearing on Monday, May 8, or as soon thereafter as same can be heard by the Supreme Court.

499 That unless the issuance of the mandate heretofore formulated by this court can be stayed pending consideration of the petition by the Supreme Court of the United States, a conflict between the order of the District Court of the Northern District of Illinois, Eastern Division, which will be entered pursuant to said mandate and the order of the United States District Court for the Northern District of Ohio, Western Division, will arise.

Toledo Scale Company is advised that it cannot consistently with its position taken in the United States District Court for the Northern District of Ohio, Western Division, and in this court and without jeopardizing its right to maintain its position, that this court is without jurisdiction to issue said mandate in its present form, give a bond conditioned to secure both "the performance and for payment of all the provisions in said mandate if and when the Toledo Company's proposed application to the Supreme Court for a writ of certiorari, prohibition or mandamus shall be denied."

Toledo Scale Company respectfully requests that the order of stay be modified so that the bond to be given by it shall be conditioned to "secure the performance and for payment of all the provisions in said

mandate, if the Supreme shall issue a writ of certiorari upon the petition of the Toledo Scale Company to be filed in the Supreme Court on or about April 20, 1922, and on hearing the mandate shall be affirmed by the Supreme Court," or that said bond be conditioned to secure the payment of the decree of the District Court of the Northern District of Illinois, entered March 5, 1919, together with interest and costs, if said petition for certiorari shall be denied or if said mandate shall be affirmed by the Supreme Court.

TRACY, CHAPMAN & WILLIS,
TENNEY, HARDING & SHERMAN,
Solicitors for Toledo Scale Company.

Endorsed: Filed Apr. 19, 1922. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day, the nineteenth day of April, 1922, in the October term 1921, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 19, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Before Hon. Francis E. Baker, Presiding Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and counsel for appellant now presents a motion that the order heretofore entered in this cause in this court on April 10, 1922 fixing the amount and terms of an additional bond and staying the mandate in this cause so that the said bond to be given shall be conditioned to secure the performance and for payment of all the provisions in said mandate, if the Supreme Court shall issue a writ of certiorari upon the petition of the Toledo Scale Company to be filed in the Supreme Court on or about April 20, 1922, and on hearing the mandate shall be affirmed by the Supreme Court, or that said bond be conditioned to secure

the payment of the decree of the District Court of the North
501 ern District of Illinois, entered March 5, 1919, together wit
interest and costs, if said petition for certiorari shall be denie
or if said mandate shall be affirmed by the Supreme Court.

On consideration whereof, It is now here ordered that the sai
motion be, and the same is hereby denied; and it is further ordere
that the time for filing the said additional bond in this cause b
and the same is hereby extended to April 25, 1922.

And afterwards, to-wit: On the twenty-sixth day of April, 192
in the October term 1921, there was filed in the office of the clerk
this court a certified copy of an order of the Supreme Court of th
United States, which said certified copy is in the words and figure
following, to-wit:

Supreme Court of the United States, October Term, 1921.

No. 891.

TOLEDO SCALE COMPANY, Petitioner,

vs.

THE COMPUTING SCALE COMPANY.

Petition for a Writ of Certiorari to the United States Circuit Court o
Appeals for the Seventh Circuit.

On consideration of the motion for a stay,

It is now here ordered by the court that the prayer of the petitioner
be granted and that an order staying further proceedings in the
United States Circuit Court of Appeals for the Seventh Circuit until
this court shall have considered and acted upon the petition for
certiorari this day filed, be granted.

April 20, 1922.

A true copy.
Test:
[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

Endorsed: Filed Apr. 26, 1922. Edward M. Holloway, Clerk.

502 & 503 United States Circuit Court of Appeals for the Seventh
Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit, do hereby certify that the fore-
going pages, numbered from 1 to 5, inclusive, contain a true copy
of the proceedings had and papers filed since April 12, 1922, in the
following entitled cause: Toledo Scale Company vs. The Cmoputing
Scale Company, No. 2784, October Term, 1921, as the same remains

upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of August, A. D. 1922.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

504 [Endorsed:] File No. 28,846. Supreme Court U. S., October Term, 1922. Term No. 339. Toledo Scale Co., Petr., vs. Computing Scale Co. Writ of Certiorari & Return. Filed Aug. 4, 1922.

505 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Toledo Scale Company is appellant, and The Computing Scale Company is appellee, No. 2784, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
506 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Seventh Circui

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Stipulation.

Whereas, Toledo Scale Company, on January 3, 1922, presente to the Supreme Court of the United States its petition for a writ o certiorari to review the above entitled cause and filed with said peti tion a transcript of the record herein consisting of three volume certified to by the clerk of this court; and

Whereas, thereafter further proceedings were had herein, and on May 15, 1922, Toledo Scale Company presented to the Supreme Court of the United States its petition for a writ of certiorari to re view said further proceedings and filed with said petition a transcript of the record consisting of the proceedings had herein from Feb ruary 10, 1922, to April 12, 1922, inclusive, certified to by the clerk of this court; and

Whereas, on May 15, 1922, Fidelity & Deposit Company of Mary land and United States Fidelity & Guaranty Company presented to the Supreme Court of the United States their petition for a writ of certiorari to review said further proceedings and tendered to the Supreme Court the said transcripts already filed in the clerk's office of the Supreme Court of the United States by Toledo Scale Company for a writ of certiorari as hereinbefore set forth; and

Whereas after April 12, 1922, certain other proceedings were had in this cause; and

Whereas on June 12, 1922, the Supreme Court of the United States, upon said petition for certiorari, filed by said Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, issued its writ of certiorari directing this court to send to it the records and proceedings in this cause.

Now, therefore, it is stipulated by and between Fidelity & Deposit Company of Maryland, United States Fidelity & Guaranty Com pany, The Computing Scale Company and Toledo Scale Company, by their respective counsel, that the certified copies of the transcripts of record heretofore filed in the Supreme Court of the United States as aforesaid, together with the certified record of all proceedings had herein since April 12, 1922, may be taken as the return to said writ of certiorari, provided that the clerk shall upon the precipe of either party, after ten days' notice to the other parties certify to the Su-

preme Court any or all exhibits identified in said transcripts and not included in said transcripts.

Dated July 13, 1922.

EDWIN J. MARSHALL,
EDWARD O. BROWN,
Solicitors for Fidelity & Deposit Company of Md. and United States Fidelity and Guaranty Company.
TRACY, CHAPMAN & WELLES,
TENNEY, HARDING & SHERMAN,
BROWN, GEDDES, SCHMETTAU & WILLIAMS,
Solicitors for Toledo Scale Company.
JOHN M. ZANE,
DRURY W. COOPER,
Solicitors for Computing Scale Company.

Endorsed: Filed July 17, 1922. Edward M. Holloway, Clerk.

507 *Return to Writ.*

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Toledo Scale Company, appellant, vs. The Computing Scale Company, appellee, No. 2784, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto, together with all the proceedings had and papers filed subsequent to April 12, 1922, which are certified and attached hereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this first day of August, A. D. 1922.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] File No. 28,928. Supreme Court of the United States, October Term, 1922. No. 388. Fidelity & Deposit Company of Maryland et al. vs. The Computing Scale Company and Toledo Scale Company. Writ of Certiorari. Filed Jul- 7, 1922. Edward M. Holloway, Clerk.

508 And afterwards, to-wit: On the nineteenth day of Apr
1922, in the October term 1921, there was filed in the off
of the clerk of this court a certain Notice, which said Notice is in t
words and figures following, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States Circuit Court of Appeals for the Seventh Circu

No. 2784.

TOLEDO SCALE COMPANY, Appellant,

vs.

THE COMPUTING SCALE COMPANY, Appellee.

Notice.

To Mr. John M. Zane,
Solicitor for Appellee:

Please take notice that on Wednesday, the nineteenth day of Apri
1922, at the hour of two o'clock P. M., or as soon thereafter as cou
sel can be heard, we shall appear before the Circuit Court of Appeal
or if said court is not in session, before one of the Judges thereof i
his chambers, and present to the court a motion, copy of which
hereto attached, at which time and place you may be present and b
heard, if you see fit.

TRACY, CHAPMAN & WILLIS,
TENNEY, HARDING & SHERMAN,
Solicitors for Appellant.

Received a copy of the above and foregoing notice, this nineteent
day of April, 1922, at the hour of 11.30 A. M.

ZANE, MORSE & MARSHALL.
JOHN M. ZANE.

Endorsed: Filed Apr. 19, 1922. Edward M. Holloway, Clerk.

509 And afterwards, to-wit: On the same day, to-wit: On th
nineteenth day of April, 1922, in the October term 1921
there was filed in the office of the clerk of this court a certain Motion
which said Motion is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Motion.

Now comes the Toledo Scale Company and represents to the court that on April 13, 1922, it presented a motion to the Supreme Court of the United States for leave to file a petition for a writ of prohibition and mandamus, directed to the Circuit Court of Appeals for the Seventh Circuit and the Judges thereof, with respect to the orders entered herein on the petition of the Computing Scale Company, filed herein February 10, 1922.

Toledo Scale Company further represents that on April 17, 1922 the Supreme Court made an order on said motion for leave to file said petition, "Denied without prejudice."

Toledo Scale Company further represents that it has prepared a petition for a writ of certiorari and a brief in support thereof, which said petition and brief will be filed with the Supreme Court of the United States on April 20, 1922, if the printing of same is completed in time, and in any event not later than April 21, 1922, and that it intends to notice said petition for hearing on Monday, May 8, or as soon thereafter as same can be heard by the Supreme Court.

510 That unless the issuance of the mandate heretofore formulated by this court can be stayed pending consideration of the petition by the Supreme Court of the United States, a conflict between the order of the District Court of the Northern District of Illinois, Eastern Division, which will be entered pursuant to said mandate and the order of the United States District Court for the Northern District of Ohio, Western Division, will arise.

Toledo Scale Company is advised that it cannot consistently with its position taken in the United States District Court for the Northern District of Ohio, Western Division, and in this court and without jeopardizing its right to maintain its position, that this court is without jurisdiction to issue said mandate in its present form, give a bond conditioned to secure both "the performance and for payment of all the provisions in said mandate if and when the Toledo Company's proposed application to the Supreme Court for a writ of certiorari, prohibition or mandamus shall be denied."

Toledo Scale Company respectfully requests that the order of stay be modified so that the bond to be given by it shall be conditioned to "secure the performance and for payment of all the provisions in

said mandate, if the Supreme Court shall issue a writ of certiorari upon the petition of the Toledo Scale Company to be filed in the Supreme Court on or about April 20, 1922, and on hearing the mandate shall be affirmed by the Supreme Court," or that said bond be conditioned to secure the payment of the decree of the District Court of the Northern District of Illinois, entered March 5, 1919, together with interest and costs, if said petition for certiorari shall be de-
511 nied or if said mandate shall be affirmed by the Supreme Court.

TRACY, CHAPMAN & WILLIS,
TENNEY, HARDING & SHERMAN,
Solicitors for Toledo Scale Company.

Endorsed: Filed Apr. 19, 1922. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day, the nineteenth day of April, 1922, in the October term 1921, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 19, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Francis E. Baker, Presiding Judge.

2784.

TOLEDO SCALE COMPANY

vs.

THE COMPUTING SCALE COMPANY.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and counsel for appellant now presents a motion that the order heretofore entered in this cause in this court on April 10, 1922 fixing the amount and terms of an additional bond and staying the mandate in this cause so that the said bond to be given shall be conditioned to secure the performance and for payment of all the provisions in said mandate, if the Supreme Court shall issue a writ of certiorari upon the petition of the Toledo Scale Company to be filed in the Supreme Court on or about April 20, 1922, and on hearing the mandate shall be

ffirmed by the Supreme Court, or that said bond be conditioned to secure the payment of the decree of the District Court of the
512 Northern District of Illinois, entered March 5, 1919, together with interest and costs, if said petition for certiorari shall be lenied or if said mandate shall be affirmed by the Supreme Court.

On consideration whereof, It is now here ordered that the said notion be, and the same is hereby denied; and it is further ordered hat the time for filing the said additional bond in this cause be, nd the same is hereby extended to April 25, 1922.

And afterwards, to-wit: On the twenty-sixth day of April, 1922, n the October term 1921, there was filed in the office of the clerk f this court a certified copy of an order of the Supreme Court of the Jnited States, which said certified copy is in the words and figures ollowing, to-wit:

Supreme Court of the United States, October Term, 1921.

No. 891.

TOLEDO SCALE COMPANY, Petitioner,

vs.

THE COMPUTING SCALE COMPANY.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

On consideration of the motion for a stay,

It is now here ordered by the court that the prayer of the petitioner e granted and that an order staying further proceedings in the Jnited States Circuit Court of Appeals for the Seventh Circuit until his court shall have considered and acted upon the petition for cer- iorari this day filed, be granted.

April 20, 1922.

A true copy.

Test:

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court
of the United States.

Endorsed: Filed Apr. 26, 1922. Edward M. Holloway, Clerk.

513 & 514 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court f Appeals for the Seventh Circuit, do hereby certify that the fore-

going pages, numbered from 1 to 5, inclusive, contain a true copy of the proceedings had and papers filed since April 12, 1922, in the following entitled cause: Toledo Scale Company vs. The Computing Scale Company, No. 2784, October Term, 1921, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of August, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

515 [Endorsed:] File No. 28928. Supreme Court U. S., October Term, 1922. Term No. 388. Fidelity & Deposit Co. of Md. et al., Peti., vs. Computing Scale Co. et al. Writ of certiorari & return. Filed Aug. 4, 1922.

Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Tuesday, the twenty-fifth day of June, being one of the days of the June Term of said Court, begun Monday, the Third day of June, in the year of our Lord one thousand nine hundred and twelve, and of our Independence the one hundred and thirty-sixth year.

Present:

Hon. Kenesaw M. Landis, Judge of said Court, presiding.

Luman T. Hoy, United States Marshal for said District and

T. C. MacMillan, Clerk of said Court.

23.

CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *Complainant,* *vs.* Toledo Computing Scale Company, *Defendant.*	In Equity. No. 30,024. Reissue Patent No. 11,536. Patent No. 597,300.

To the Honorable, the Judges of the Circuit Court of the United States, for the Northern District of Illinois:

The Computing Scale Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal offices located in the City of Dayton, County of Montgomery and State of Ohio, complainant, brings this its bill of complaint against the Toledo Computing Scale Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having an office and regular and established place of business in the City of Chicago, County of Cook and State of Illinois, in the Northern District and Eastern Division thereof, defendant; and thereupon your orator complains and says:

I. That your orator is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Ohio, and a citizen of said State, having its principal offices or place of business located in the City of Dayton, County of Montgomery and State of Ohio; and that the defendant corporation duly organized and existing under and by virtue of the laws of the State of New Jersay, and a citizen of said State, having a regular and established place of business located in the City of Chicago, County of Cook and State of Illinois, in the Northern District and Eastern Division thereof, in which the acts of infringement herein complained of were committed.

II. And your orator further shows unto your Honors that heretofore, and before the 2nd day of May, 1895, one Albert U. Smith, a citizen of the United States and resident of Seymour, in the County of New Haven and State of Connecticut,

became and was the original, first and sole inventor or discoverer of certain new and useful improvements in automatic computing scales, fully shown and described, and partially claimed in letters patent of the United States hereinafter mentioned, which improvements in automatic computing scales were not known or used by others in this country and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for letters patent, and which had not been abandoned to the public.

III. And your orator further shows unto your Honors that by a deed of assignment in writing, dated the 4th day of May, 1895, the said Albert U. Smith did assign to one Edmond C. Smith, of Westport, Connecticut, an undivided one-half of the entire right, title and interest in and to said invention or improvements, application and letters patent, which assignment was duly signed, sealed and delivered, and recorded in the United States Patent Office June 21, 1895, in Liber W 51, page 225 of Transfers of Patents, whereby the said Edmond C. Smith, his heirs and assigns, became the owner of one-half of the entire right, title and interest in and to said invention or improvements, and in and to any and all Letters Patent of the United States which might be issued covering or securing the same, which assignment, or a duly certified copy thereof, your orator stands ready here in court to produce as your Honors may direct.

IV. And your orator further shows unto your Honors that the said Albert U. Smith being the original, first and sole inventor of said improvements in automantic computing scales, did on or about the 2nd day of May, 1895, make application in due form of law to the Commissioner of Patents of the United States for letters patent, in accordance with the then existing laws of Congress, and having duly computed in all essential respects with the requirements of said laws of Congress, and due proceedings being had thereon, on the 3rd day of September, 1895, letters patent of the United States, duly signed and sealed by the proper officers and bearing date the day and year last aforesaid, and numbered 545,616, were issued and delivered to the said Albert U. and Edmond C. Smith, whereby there was granted and secured to the said Albert U. and Edmond C. Smith, their heirs and assigns, for the term of seventeen years from and after the date of said letters patent, the full and exclusive right and liberty of making, using and vending throughout the United States and Ter-

ritories thereof the improvements or invention therein shown, described, and claimed a description whereof is more fully set forth in the specification and drawings thereof, which letters patent, or a duly authenticated copy thereof, your orator will produce as your Honors shall direct, and a printed office copy of which is hereto attached and made a part hereof.

V. And your orator further shows unto your Honors that immediately after the issuance of said letters patent No. 545,616 it was discovered that said letters patent were inoperative by reason of defects and insufficiencies in the specification and claims thereof, which claims failed to fully secure to the said Albert U. Smith and his assignee Edmond C. Smith the aforesaid invention or improvements, as described in said letters patent and intended to be covered therein, and that the errors, defects and insufficiencies which rendered said letters patent inoperative were caused by inadvertence, accident and mistake, and without any fraudulent or deceptive intent on the part of the said Albert U. Smith; that thereupon the said Albert U. Smith, with the consent of the said Edmond C. Smith in writing, did on January 27, 1896, without any unreasonable or unavoidable delay on the part of either the said Albert U. or Edmond C. Smith, surrender the said letters patent No. 545,616 and applied in due form of law for a reissue thereof, and having duly complied in all essential respects with all the conditions and requirements of the Statutes of the United States in such cases made and provided, thereafter, upon due examination and other proper proceedings duly had, the said letters patent No. 545,616 were duly cancelled by the Commissioner of Patents, and on the 28th day of April, 1896, there was issued by the Commissioner of Patents to the said Albert U. and Edmond C. Smith, as assignee of one-half the entire right, title and interest therein, new and reissued letters patent for the same invention or improvements, numbered 11,536, all duly signed, sealed and executed in due form of law, for the unexpired period of seventeen years from the 3rd day of September, 1895, whereby three was granted to the said Albert U. and Edmond C. Smith, their heirs and assigns, for the said unexpired period of seventeen years the full and exclusive right and liberty of making, using, and vending to others to be used throughout the United States of America and Territories thereof the inventions or improvements therein described and claimed, as by reference to said reissued letters patent, or a printed Patent Office copy of the specification and drawings thereof which is hereto attached and made a part hereof, will more fully appear.

VI. And your orator further shows unto your Honors that on the 12th day of January, 1897, the said Albert U. and Edmond C. Smith did, by a deed of assignment in writing, signed, sealed and delivered by them, sell, assign, transfer and set over unto the E. C. Smith Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, with principal offices or place of business located at Saugatuck, Connecticut, its successors and assigns, the entire right, title and interest in and to said reissued letters patent No. 11,536 and in and to the invention and improvements described and claimed therein, which assignment was duly recorded in the Patent Office of the United States on January 15, 1897, in Liber A-55, page 82 of Transfers of Patents, which assignment, or a duly authenticated copy thereof your orator will here in court produce as your Honors may direct.

VII. And your orator further shows unto your Honors that heretofore, and before the 30th day of July, 1897, the said Albert U. Smith, being then as now a citizen of the United States and resident of Saugatuck, in the County of New Haven and State of Connecticut, became and was the original, first and sole inventor of certain new and useful improvements or inventions in price-scales, fully shown, described and claimed in letters patent of the United States hereinafter mentioned, which improvements in price-scales were not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale in the United States for more than two years prior to his application for letters patent, and which had not been abandoned to the public.

VIII. And your orator further shows unto your Honors that the said Albert U. Smith, being the original, first and sole inventor of such improvements in price-scales, did by a deed of assignment in writing bearing date the 28th day of July, 1897, sell, assign, transfer and set over unto the E. C. Smith Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, with principal offices located at Saugatuck, in the County of New Haven and State of Connecticut, its successors and assigns, the sole and exclusive right in and to said invention and improvements and in and to any and all letters patent of the United States which might be granted covering or securing the same, which assignment was duly signed, sealed and de-

livered, and recorded in the United States Patent Office July 30, 1897, in Liber L-55, page 448 of Transfers of Patents.

IX. And your orator further shows unto your Honors that the said Albert U. Smith, being the original, first and sole inventor of such new and useful improvements or invention in price scales did, on or about the 30th day of July, 1897, make application in due form of law to the Commissioner of Patents for letters patent of the United States, in accordance with the then existing laws of Congress, and having duly complied in all essential respects with the said laws of Congress, and due proceedings being had on said application, on the 11th day of January, 1898, letters patent of the United States, signed by the proper officers and bearing date the day and year last aforesaid, and numbered 597,300, were issued thereon and delivered to the said E. C. Smith Company, whereby there was granted and secured to said corporation, its successors and assigns, for the term of seventeen years from and after the date of said letters patent, the full and exclusive right and liberty of making, using and vending throughout the United States and Territories thereof the improvements and invention therein shown, described and claimed, a description whereof is more fully set forth in the specification and drawings thereof, a printed Office copy of which is hereunto attached and made a part hereof.

X. And your orator further shows unto your Honors that thereafter, to-wit, on the 7th day of April, 1898, the said E. C. Smith Company did, by a deed of assignment in writing, bearing said date, sell, assign, transfer and set over unto the Boston Computing Scale Company, of Boston, Massachusetts, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts with principal offices and place of business located at Boston, Massachusetts, its successors and assigns, the entire right, title and interest in and to said reissued letters patent No. 11,536 and letters patent No. 597,300, and in and to the invention and improvements described and claimed therein, which assignment was duly executed and delivered, and recorded in the United States Patent Office March 13, 1899, in Liber W-58, page 351 of Transfers of Patents; and that thereafter, to-wit, on the 8th day of March, 1899, the said Boston Computing Scale Company did, by deed of assignment in writing, bearing said date, sell, assign, transfer, and set over unto your orator, its successors and assigns, the said improvements or invention in automatic computing and price scales, and all rights in and to said reissued letters patent No. 11,536 and letters patent No.

597,300, which assignment was duly executed and delivered, and recorded in the United States Patent Office March 13, 1899, in Liber W-58, page 353 of Transfers of Patents, whereby your orator became the sole and exclusive owner of the entire right, title and interest in and to said inventions or improvements and in and to said letters patent, and each of them, and became exclusively entitled to bring this suit against the defendant named herein, which aforesaid assignments, or duly authenticated copies thereof, your orator will here in court produce as your Honors shall direct.

XI. And your orator further shows unto your Honors that the inventions described and claimed in said letters patent, and each of them, and set forth therein, are capable of conjoint use in one and the same machine, and are so used by your orator; and that in the automatic computing and price-scales herein complained of they are in fact so conjointly used by the said defendant.

XII. And your orator further shows unto your Honors that such improvements or inventions in computing and price-scales shown, described and claimed in the letters patent enumerated herein, and each of them, have been and are of great benefit and use to your orator, and that it has invested and expended large sums of money and been to great trouble and expense in and about such improvements or inventions in computing and price-scales, for the purpose of introducing them into public use and making them profitable and useful to the public; that said improvements or inventions have been and are of great utility and value, and of great benefit to the public, and have become widely and favorably known throughout the United States and foreign countries—a great demand for such scales having been created within the United States; that your orator is able and desires to supply all demands of the public for such scales; that the public generally have acknowledged and acquiesced in the validity of said letters patent and in the exclusive rights secured to your orator thereby; and that your orator believes it will realize and receive large gains and profits from said improvements or inventions in computing and price-scales if the defendant be enjoined from continuing its infringement of said letters patent.

XIII. And your orator further shows unto your Honors that it is informed and believes, and avers, that at divers times between the dates of said letters patent and the filing of this bill of complaint, and particularly at divers times between

the date when your orator acquired the whole right, title and interest in and to said letters patent, and each of them, and the filing of this bill of complaint, the defendant herein, well knowing the facts herein set forth, but contriving to injure your orator and to deprive it of the benefits and advantages which might and otherwise would have accrued to it from said letters patent and the improvements or inventions in computing and price-scales therein shown, described and claimed, has been and now is engaged in manufacturing, selling and using and causing others to use, computing and price-scales embodying the inventions or improvements shown, described and claimed in said letters patent, and each of them, and constructed in the manner set forth and particularly claimed therein, in the City of Chicago, and within the Northern District and Eastern Division of Illinois, and elsewhere within the United States, without any license or allowance of your orator or its predecessors, and against its will, and in violation of its rights, and in infringement of said letters patent, and each of them; that the defendant, as your orator is informed and believes, and avers, intends and threatens to manufacture, sell and use, and cause others to use computing and price-scales embodying the improvements and inventions shown, described and claimed in said letters patent, and each of them, and constructed in accordance with said letters patent and particularly claimed therein, in said City of Chicago, and elsewhere within the United States, without any license or allowance of your orator or its predecessors, and against its will and in defiance of its rights acquired by and secured to it under said several letters patent, and in infringement thereof, by reason whereof your orator is being deprived of great gains and profits which might and otherwise would have been obtained by it, but which have been and are now being received and enjoyed by the said defendant by and through its aforesaid unlawful acts and doings; and that your orator is unable to state how many of such computing and price-scales the defendant has made, sold or used, or to what extent it has made, sold or used the same, but it is informed and believes, and avers, that the defendant has made, sold and used, and caused others to make, sell and use a very large number of such scales embodying the improvements or inventions shown, described and claimed in said letters patent, and each of them, and constructed in accordance therewith, as particularly claimed therein, in said City of Chicago and

elsewhere within the United States, in infringement of said letters patent, and prays a discovery thereof.

XIV. And your orator further shows unto your Honors that it has given notice to the public, by causing the scales manufactured and sold by it under and in accordance with the aforesaid letters patent, and each of them, to be marked with the date of said letters patent, and each of them, in accordance with Section 4900 of the Revised Statutes of the United States in such cases made and provided, by affixing thereto the word "patented," together with the day and year on which said letters patent, and each of them, were issued and granted; that it has already notified the said defendant of its infringement of said letters patent, and each of them, and has requested it to desist therefrom, and yet said defendant has continued after such notice and request to make, sell and use scales in violation and infringement of said letters patent, and each of them, and still persists in said unlawful acts and in infringing said letters patent; that the said defendant still continues to make, sell and use scales containing and embodying the inventions and improvements described and claimed in said letters patent, and each of them, without any allowance from your orator and without any lawful right, as aforesaid, in infringement of said letters patent, and each of them; and that such unlawful acts of said defendant and disregard and violation of the rights of your orator, as aforesaid, have the effect to and do encourage others to disregard the rights of your orator as aforesaid.

All of which acts, doings and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

XV. In consideration whereof, and forasmuch as your orator can have no adequate relief in the premises, except in this court, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the defendant may, if it can, show cause why your orator should not have the relief hereby prayed, and may, according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the premises, and to all of the several matters hereinbefore stated, charged and alleged, as fully and particularly as if interrogated as to each and every of such matters (but not under oath, an answer under oath being hereby expressly waived), and may be compelled to account for and pay over to your orator the profits, gains and savings by it acquired, and the

damages suffered by your orator from said unlawful acts; and to account for and pay over to your orator all such profits, gains and savings as have accrued to and arisen, or been earned or received by the said defendant, or to which your orator may be entitled by reason of said unlawful making, selling and using by the defendant of scales embodying the improvements or inventions shown, described and claimed in said letters patent, and each of them, and all such gains and profits as your orator would have received, but for said unlawful acts and doings of the defendant.

Wherefore your orator prays:

1. That the defendant may answer the premises, but not under oath, an answer under oath being hereby expressly waived.

2. That the defendant, its officers, directors, clerks, servants, agents, attorneys, and employees, and each of them, may be enjoined perpetually, and also preliminarily, during the pendency of this suit from infringing said letters patent, and each of them.

3. That the defendant may be compelled to account to your orator for all scales made, sold and used by it in violation of your orator's exclusive rights as aforesaid, and in infringement of said letters patent, and each of them, and also all moneys received therefrom or thereby, and may be decreed to pay over to your orator any and all profits, gains and savings made or derived by it from the making, selling and using of all scales made, sold and used by it in violation of your orator's rights and in infringement of said letters patent, and each of them, together with all damages suffered by your orator from said unlawful acts of the defendant, and to which your orator may be lawfully entitled.

4. That your Honors will increase the actual damages to be so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by the defendant, as herein set forth.

5. That the defendant may be decreed to pay the costs of this suit.

And for other and further relief may it please your Honors to grant unto your orator:

1. A writ of subpoena of the United States of America, in due and usual form and under the usual penalties, directed to the defendant, Toledo Computing Scale Company, commanding it to appear and answer to this bill of complaint, but not under oath, an answer under oath being hereby ex-

pressly waived, and to abide by and perform such order and decree in the premises as to the court shall seem meet and shall be required by the principles of equity and good conscience.

2. A writ of injunction restraining the defendant, its officers, directors, clerks, servants, agents, attorneys, and employees, and each of them, during the pendency of this suit, from further using scales embodying the improvements or inventions shown, described and claimed in said letters patent, and from infringing said letters patent, or in any way violating the rights of your orator thereunder.

3. A writ of injunction restraining the defendant, its officers, directors, clerks, servants, agents, attorneys, and employees, and each of them, perpetually, from making, selling and using scales embodying the improvements or inventions shown, described and claimed in said letters patent, and each of them, and from infringing said letters patent, or in any way violating the rights of your orator thereunder.

All duly sealed and attested in due and usual form and under the usual penalties, and directed to the defendant, Toledo Computing Scale Company.

And such other and further relief as equity and good conscience may require and to your Honors shall seem meet.

And your orator will ever pray, etc.

THE COMPUTING SCALE COMPANY,
By O. O. OZIAS,
Vice-President.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Solicitors for Complainant.
THOMAS F. SHERIDAN,
CHARLES F. MORSE,
Of Counsel.

State of Ohio, }
County of Montgomery, } ss.

On this 21st day of May, A. D. 1910, before me, a Notary Public in and for the county and sttae aforesaid, personally appeared O. O. Ozias, who, being by me duly sworn, did depose and say that he is the vice-president of The Computing Scale Company, the complainant corporation named in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof; that the said bill of complaint is

true of his own knowledge, except as to matters therein stated to be on information and belief, and as to these he believes it to be true; that he is duly authorized to sign said bill of complaint for said complainant corporation; that he verily believes the said Albert U. Smith, named in said bill of complaint, was the first original and sole inventor of the improvements in computing and price-scales shown, described and claimed in said reissued letters patent No. 11,536 and letters patent No. 597,300, referred to in said bill of complaint, and upon which this suit is brought and that he verily believes the said letters patent, and each of them, to be in all respects good and valid in law and the title thereto vested in the complainant, as alleged in said bill of complaint.

O. O. OZIAS.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first aforesaid.

H. M. WALSH,
Notary Public.

(Seal.)

(Bill of complaint filed May 23, 1910.)

UNITED STATES CIRCUIT COURT

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *Complainant,*
vs.
Toledo Computing Scale Company, *Defendant.*
} In Equity. No. 30,024.

ANSWER.

The answer of the Toledo Computing Scale Company, defendant, to the bill of complaint of The Computing Scale Company, complainant:

This defendant, now and at all times hereafter saving and reserving unto itself all and all manner of benefit and advantage of exception which can or may be had or taken to the

manifold errors, uncertainties, insufficiencies and imperfections in the said bill of complaint contained, for answer thereto, or to so much and such parts thereof as it is advised it is material or necessary for it to make answer unto, answering says:

I.

It denies each and every allegation in said bill of complaint contained, except as hereinafter admitted or otherwise specifically answered.

II.

It is not informed, save by said bill of complaint, whether the complainant, The Computing Scale Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and a citizen of said State, having its principal office or place of business located in the City of Dayton, County of Montgomery and State of Ohio, and therefore denies the allegations of the bill of complaint in these respects and leaves complainant to its proof thereof.

III.

It admits that the defendant, Toledo Computing Scale Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and having a regular and established place of business located in the City of Chicago, County of Cook and State of Illinois, in the Northern District and Eastern Division thereof, but denies that it has there or elsewhere committed any of the acts of infringement recited in said bill of complaint.

IV.

It admits, on information and belief, that letters patent of the United States No. 545,616, were issued on the 3rd day of September, 1895, to Albert U. Smith of Seymour, Connecticut, and Edmond C. Smith, of Westport, Connecticut, upon the application of the said Albert U. Smith, for an alleged improvement in Automatic Computing Scales; but it denies that the said Albert U. Smith was the original sole inventor or discoverer of the alleged improvements described and claimed in said letters patent, denies that said improvements were not known or used by others in this country and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof,

and not in public use or on sale for more than two years prior to his application for said letters patent, and not abandoned to the public.

V.

It avers, on information and belief, that prior to the alleged invention or discovery by the said Albert U. Smith of the alleged improvements described and claimed in said letters patent, the same and every material part thereof had been known and used by others in this country and had been patented and described in printed publications in this and other countries, and that the said alleged invention and every matrrial part thereof had been in public use and on sale in this country for more than two years prior to the application of the said Albert U. Smith for said letters patent, and had been abandoned to the public.

VI.

It is not informed, save by said bill of complaint, whether by a deed of assignment in writing dated the 4th day of May, 1895, the said Albert U. Smith did assign to Edmond C. Smith an undivided one-half of the entire right, title and interest in and to said alleged invention and improvement, application and letters patent, or whether said alleged improvement was duly signed, sealed and delivered and recorded in the Patent Office of the United States, or whether the said Edmond C. Smith, his heirs and assigns, became the owner of one-half of the entire right, title and interest in and to said alleged invention and improvements and in and to any and all letters patent of the United States which might be issued covering or securing the same, and therefore denies the allegations of the bill of complaint in these respects and leaves complainant to its proof thereof.

VII.

It is not informed, save by said bill of complaint, whether the said Albert U. Smith made application in due form of law to the Commissioner of Patents of the United States for letters patent, in accordance with the then existing laws of Congress, and complied in all essential respects with the requirements of said laws of Congress, or whether the letters patent which were issued to the said Albert U. Smith and said Edmond C. Smith on the third day of September, 1905, were duly signed and sealed by the proper officers and issued

and delivered to the said Albert U. Smith and Edmond C. Smith, and therefore denies the allegations of the bill of complaint in this respect and leaves complainant to its proof thereof; and it further denies that said letters patent did grant and secure to the said Albert U. Smith and Edmond C. Smith, their heirs and assigns, for the term of seventeen years from and after the date of said letters patent, the full and exclusive right and liberty of making, using and vending throughout the United States and Territories thereof the alleged invention and improvements therein shown, described and claimed.

VIII.

At admits, on information and belief, that said letters patent No. 545,616 were surrendered, and that on the 28th day of April, 1896, new and reissued letters patent were issued unto the said Albert U. Smith and Edmond C. Smith for the unexpired portion of the term of said original letters patent; but it denies that said original letters patent were inoperative by reason of defects and insufficiencies in the specification and claims thereof, or that the claims thereof failed to fully secure to the said Albert U. Smith and his assignee, Edmond C. Smith, the aforesaid alleged invention and improvements as described in said letters patent and intended to be covered thereunder; denies that the alleged errors, defects and insufficiencies which it is alleged rendered said letters patent inoperative were caused by inadvertence, accident and mistake, without any fraudulent or deceptive intent on the part of the said Albert U. Smith; denies that on account of said alleged defects and insufficiencies in said letters patent the said Albert U. Smith, with the consent of the said Edmond C. Smith in writing, did, without any unreasonable or avoidable delay on the part of either the said Albert U. Smith or Edmond C. Smith, surrender said letters patent No. 545,616 and apply in due form of law for a reissue thereof; denies that due cause was shown for the surrender of said letters patent and the grant of a reissue thereof; denies that the conditions and requirements of the statutes of the United States in such cases made and provided were in all respects duly complied with; denies that the said reissued letters patent were signed, sealed and executed in due form of law; denies that said reissued letters patent are for the same alleged invention and improvements as those described and claimed in said original letters patent; and denies that by said reissued letters patent

there was granted to the said Albert U. Smith and Edmond C. Smith, their heirs and assigns, for the unexpired portion of the term of said original letters patent, the exclusive right and liberty of making, using and vending to others to be used, throughout the United States of America and Territories thereof the alleged inventions and improvements described and claimed in said reissued letters patent.

IX.

It avers, on information and belief, that said original letters patent No. 545,616 were not inoperative to fully secure to the said Albert U. Smith and Edmond C. Smith the exact invention and improvement which was described in said letters patent and which was intended to be secured thereby; avers that said letters patent were operative and sufficient to fully secure to said Albert U. Smith and Edmond C. Smith the exact invention described in said letters patent and intended to be secured thereby; avers that there was no defect or error in said original letters patent, and no inadvertence, accident and mistake in connection with the application for and securing of said letters patent, rendering the same inoperative or defective or insufficient to secure to the said Albert U. Smith and Edmond C. Smith the exact invention described in said letters patent and intended to be secured thereby; avers that the purpose and intent of the said Albert U. Smith and the said Edmond C. Smith in surrendering said original letters patent was not to remove or cure any inoperativeness, defect or insufficiency in said original letters patent, or any error therein arising from inadvertence, accident and mistake; avers that said original letters patent were not surrendered and the application for reissued letters patent filed for the purpose of securing reissued letters patent for the same invention as that described and claimed and intended to be covered in and by said original letters patent, but that the surrender of said original letters patent and said application for reissued letters patent were for the purpose of obtaining letters patent for a different invention from that described and claimed and intended to be secured as the invention of the said Albert U. Smith in and by said original letters patent, and for the purpose of obtaining reissued letters patent covering and including within their scope matters and things not covered by and included within the scope of said original letters patent and which had been made, used, sold and introduced into use subsequent to the issue of said original letters patent and prior to

the application for said reissued letters patent; and avers that said reissued letters patent are for a different invention from that described and claimed and intended to be secured as the invention of the said Albert U. Smith in and by said original letters patent, and cover and include within their scope matters and things not covered by and included within the scope of said original letters patent and which had been made, used, sold and introduced into public use subsequent to the issue of said original letters patent and prior to the application for said reissued letters patent, and that said reissued letters patent are therefore void.

X.

It is not informed, save by said bill of complaint, whether the said Albert U. Smith and Edmond C. Smith did, on the 12th day of January, 1897, by a deed or assignment in writing, and signed, sealed and delivered by them, sell, assign, transfer and set over unto the E. C. Smith Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, with its principal offices or place of business located at Saugatuck, Connecticut, its successors and assigns, the entire right, title and interest in and to said reissued letters patent and in and to the alleged invention and improvements described and claimed therein, and therefore denies the allegations of the bill of complaint in these respects and leaves complainant to its proof thereof.

XI.

It admits, on information and belief, that letters patent of the United States No. 597,300 were issued on the 11th day of January, 1898, to the E. C. Smith Company, of Saugatuck, Connecticut, upon the application of one Albert U. Smith of the same place, for alleged improvements in price scales; but it denies that the said Albert U. Smith was the original, first and sole inventor of the alleged invention and improvements described and claimed in said letters patent, denies that said alleged invention and improvements were not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, denies that they had not been in public use or on sale in the United States for more than two years prior to his application for said letters patent, and denies that they had not been abandoned to the public.

XII.

It avers, on information and belief, that prior to the alleged invention or discovery by the said Albert U. Smith of the alleged invention and improvements described and claimed in said letters patent No. 597,300 the same and every material part thereof had been known and used by others in this country, and had been patented and described in printed publications in this and other countries, and that said alleged invention and improvements and every material part thereof had been in public use and on sale in this country for more than two years prior to the application of the said Albert U. Smith for said letters patent, and had been abandoned to the public. It is not informed, save by said bill of complaint, whether the said Albert C. Smith did, by a deed of assignment in writing dated the 28th day of July, 1897, sell, assign, transfer and set over unto the E. C. Smith Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut with its principal offices located at Saugatuck, in the County of New Haven and State of Connecticut, its successors and assigns, the sole and exclsuive right in and to said alleged invention and improvements and in and to any and all letters patent of the United States which might be granted covering or securing the same, as recited in paragraph VIII of said bill of complaint, and therefore denies the allegations of the bill of complaint in these respects and leaves complainant to its proof thereof.

XIII.

It is not informed, save by said bill of complaint, whether the said Albert U. Smith did, on or about the 30th day of July, 1897, make application in due form of law to the Commissioner of Patents for letters patent of the United States, in accordance with the then existing laws of Congress, and duly complied in all essential respects with said laws of Congress, or whether the letters patent which were issued to the said Edmond C. Smith Company on the 11th day of January, 1898, were signed by the proper officers and delivered to the said E. C. Smith Company, and therefore denies the allegations of the bill of complaint in these respects and leaves complainant to its proof thereof; and it further denies that the said letters patent did grant and secure to said corporation, its successors and assigns, for the term of seventeen years from and after the date of said letters patent, the full

and exclusive right and liberty of making, using and vending, throughout the United States and territories thereof the alleged invention and improvements therein shown, described and claimed.

XIV.

It is not informed, save by said bill of complaint, whether on the 7th day of April, 1908, the said Edmond C. Smith Company did, by a deed or assignment in writing bearing said date, sell, assign, transfer and set over unto the Boston Computing Scale Company of Boston, Massachusetts, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts with its principal offices and place of business located at Boston, Massachusetts, its successors and assigns, the entire right, title and interest in and to said reissued letters patent, and said letters patent No. 597,300, and in and to the alleged invention and improvements described and claimed therein, or whether the said Boston Computing Scale Company did, on the 8th day of March, 1899, by a deed of assignment in writing, bearing said date, sell, assign, transfer and set over unto The Computing Scale Company, complainant, its successors and assigns, the said alleged invention and improvements and all rights in and to said reissued letters patent and said letters patent No. 597,300, and therefore denies the allegations of the bill of complaint in these respects and leaves complainant to its proof thereof; and it further denies that by virtue of said alleged assignments, or otherwise, said complainant became the sole and exclusive owner of the entire right, title and interest in and to said alleged inventions and improvements and in and to said letters patent and each of them, and became exclusively entitled to bring this suit against this defendant.

XV.

It denies that the alleged inventions described and claimed in said letters patent, and each of them, are capable of conjoint use in one and the same machine, and that they have been so used by either the complainant or the defendant.

XVI.

It denies that the said alleged inventions and improvements described and claimed in the aforesaid letters patent, and each of them, have been and are of great benefit and use

to the complainant, and that the latter has invested and expended large sums of money and been to great trouble and expense in and about said alleged inventions and improvements for the purpose of introducing them into public use and making them profitable and useful to the public; denies that said alleged inventions and improvements have been and are of great utility and value and of great benefit to the public, and have become widely and favorably known throughout the United States and foreign countries, and that a great demand for scales embodying said alleged inventions and improvements has been created within the United States, and that the public generally have acknowledged and acquiesced in the validity of said letters patent and in the alleged exclusive rights of the complainant thereunder, and denies that the complainant would realize and receive large gains and profits from said inventions and improvements if the defendant were enjoined from continuing its alleged infringement of said letters patent.

XVII.

It denies that at any time between the dates of said letters patent and the filing of the bill of complaint herein, or at any time between the date when complainant is alleged to have acquired the whole right, title and interest in and to said letters patent and each of them, and the filing of the bill of complaint herein, it, the defendant, has been and now is engaged in manufacturing, selling and using, and causing others to use, computing and price scales embodying the alleged inventions and improvements shown, described and claimed in said letters patent, and each of them, and constructed in the manner set forth and particularly claimed therein, in the City of Chicago, and within the Northern District and Eastern Division of Illinois, or elsewhere within the United States; denies that it, the defendant, has at any time or place, made, used or sold, or caused to be made, used or sold, any scales of any kind embodying the alleged inventions and improvements described and claimed in said letters patent, or either of them, or any part thereof, or in any manner infringed said letters patent, or either of them, or violated any rights of the complainant thereunder; denies that it intends and threatens to manufacture, sell and use, and cause others to use, computing and price scales embodying the alleged improvements and inventions shown, described and claimed in said letters patent, or either of them, and con-

structed in accordance with said letters patent and particularly claimed therein, in said City of Chicago, or elsewhere within the United States, or that it intends or threatens to infringe said letters patent, or either of them, or violate any rights of the complainant thereunder; and denies that complainant has been or is being deprived of any gains and profits which might and otherwise would have been obtained by it but for any acts or conduct of the defendant, but which have been and are now being received and enjoyed by the defendant by and through any unlawful act or conduct of said defendant.

XVIII.

It denies that the complainant has given notice to the public, by causing the scales manufactured and sold by it under and in accordance with the aforesaid letters patent, and each of them, to be marked with the date of said letters patent, and each of them, in accordance with Section 4900 of the Revised Statutes of the United States in such cases made and provided, by affixing thereto the word "Patented," together with the day and year on which said letters patent, and each of them, were issued and granted; denies that complainant has notified the defendant of its alleged infringement of said letters patent, and each of them, and requested it to discontinue therefrom; denies that said defendant has continued after such alleged notice and request to make, sell and use scales in violation and infringement of said letters patent, and each of them, and that it still persists in any unlawful acts and in infringement of said letters patent, and still continues to make, use and sell scales containing and embodying the alleged invention and improvements described and claimed in said letters patent, or either of them; and denies that any acts or conduct of the defendant have had the effect to encourage others to disregard any rights of the complainant under said letters patent.

XIX.

It avers, on information and belief, that in view of the prior state of the art at the date of the alleged invention thereof by the said Albert U. Smith, and in view of the common knowledge and practice in the United States in the art of automatic computing scales and analogous arts, and in view of the letters patent and other printed publications illustrating and describing said arts prior to the date of the

alleged invention of the said Albert U. Smith, the alleged invention and improvements described and claimed in the aforesaid reissued letters patent did not constitute a patentable invention, and that said letters patent are therefore void.

XX.

It avers, on information and belief, that in view of the prior state of the art at the date of the alleged invention thereof by the said Albert U. Smith, and in view of the common knowledge and practice in the United States in the art of price scales and analogous arts, and in view of the letters patent and other printed publications illustrating and describing said arts prior to the date of the alleged invention of the said Albert U. Smith, the alleged invention and improvements described and claimed in the aforesaid letters patent No. 597,300 did not constitute a patentable invention.

XXI.

It avers, on information and belief, that for more than two years prior to the application of the said Albert U. Smith for said original letters patent No. 545,616, the alleged invention and improvements described and claimed in said reissued letters patent were publicly used and offered for sale and sold by the said Albert U. Smith and by others with his knowledge and consent, at Seymour, Connecticut, and at Saugatuck, Connecticut, and elsewhere within the United States, and were abandoned to the public.

XXII.

It avers, on information and belief, that prior to the invention by the said Albert U. Smith of the alleged invention and improvements described and claimed in the aforesaid reissued letters patent, and for more than two years prior to his application for said original letters patent No. 545,616 said alleged invention and improvements described and claimed in said reissued letters patent and every material and substantial part thereof, were known to and used by, and were publicly used and offered for sale and sold by various persons at various places within the United States, and among others at Pawtucket, Rhode Island, by William H. Phinney, then and now, as defendant is informed and believes, residing at said Pawtucket; at Garrattsville, New York, by Charles M. Babcock, then and now, as defendant

is informed and believes, residing at the city of Garrettsville; at Las Vegas, New Mexico, by Edward W. Wise, then and now, as defendant is informed and believes, residing at said Las Vegas; at Dayton, Ohio, by Lutie F. Kepler, now, as defendant is informed and believes, deceased; and by The Computing Scale Company, then and now, as defendant is informed and believes, a corporation of the State of Ohio, with its principal office and place of business at the City of Dayton.

XXIII.

It avers, on information and belief, that the said Albert U. Smith was not the original and first inventor of the subject-matter of said reissued letters patent, but that prior to his alleged invention thereof said subject-matter had been invented by Edward W. Wise of Las Vegas, New Mexico, then and now, as defendant is informed and believes, residing at Las Vegas, and who was using due diligence in perfecting the same and reducing it to practice; and by Lutie F. Kepler, since deceased, as defendant is informed and believes, who was using due diligence in adapting and perfecting the same and reducing it to practice.

XXIV.

It avers, on information and belief, that prior to the invention by the said Albert U. Smith, of the alleged invention and improvements described and claimed in said reissued letters patent, the said alleged invention and improvements, and every material and substantial part thereof, had been patented and described in various letters patent and printed publications, among others in letters patent of the United States No. 106,869, granted to William H. Phinney on August 30, 1870; No. 421,805, granted to Charles M. Babcock, February 18, 1890; No. 514,475, granted to Lutie F. Kepler, February 13, 1894, and No. 532,129, granted to Edward W. Wise, January 18, 1895.

XXV.

It avers, on information and belief, that for more than two years prior to the application of the said Albert U. Smith for the aforesaid letters patent No. 597,300 the alleged inventions and improvements described and claimed therein were publicly used and offered for sale and sold by the said Albert U. Smith, and by others with his knowledge and consent, at

Saugatuck, Connecticut, and elsewhere within the United States, and were abandoned to the public.

XXVI.

It avers, on information and belief, that prior to the alleged invention by the said Albert U. Smith of the alleged improvements described and claimed in said letters patent No. 597,300, and for more than two years prior to his application for said letters patent, said alleged invention and improvements, and every material and substantial part thereof were known to and used by, and were publicly used and offered for sale and sold by various persons at various places in the United States, and among others at Pawtucket, Rhode Island, by William H. Phinney, then and now, as defendant is informed and believes, residing at said Pawtucket, and at Garrattsville, New York, by Charles M. Babcock, then and now, as defendant is informed and believes, residing at said Garrattsville.

XXVII.

It avers, on information and belief, that prior to the alleged invention by the said Albert U. Smith of the alleged invention and improvements described and claimed in said letters patent No. 597,300, said alleged invention and improvements, and every material part thereof, had been patented and described in various letters patent and printed publications, among others in letters patent of the United States No. 106,869, granted to William H. Phinney, August 30, 1870; No. 421,805, granted to Charles M. Babcock, February 18, 1890; No. 438,153, granted to MacPhelps, October 21, 1890, and No. 310,014, granted to Henry Pottin, February 10, 1885.

All of which matters and things this defendant is ready to aver, maintain and prove, as this Honorable Court shall direct, and prays to be hence dismissed with its costs in this behalf sustained.

TOLEDO COMPUTING SCALE COMPANY,
By RECTOR, HIBBEN, DAVIS & MACAULEY,
Its Solicitors.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.
EDWARD RECTOR,
Of Counsel.
Filed Aug. 1, 1910.

UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *Complainant,*
vs.
Toledo Computing Scale Company, *Defendant.*
} In Equity. No. 30,024.

AMENDMENT TO THE ANSWER.

And now comes the defendant and amends his answer herein as follows:

In line 11, page 9, cancel the numeral "1908" and insert in lieu thereof "1898."

Page 17, line 4, cancel the numeral "438,153" and substitute therefor "438,753."

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for the Toledo Computing Scale Company.

Filed Aug. 15, 1910.

UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *Complainant,*
vs.
Toledo Computing Scale Company, *Defendant.*
} In Equity. No. 30,024

AMENDMENT TO THE ANSWER.

And now comes the defendant and amends his answer herein as follows:

Page 17, line 4, cancel the numeral "310,014" and substitute therefor the numeral "312,014."

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for the Toledo Computing Scale Company.

Filed Aug. 18, 1910.

22.

IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024

AMENDMENT TO ANSWER.

Now comes the defendant herein and amends its answer in the following particulars:

(1) By changing the period to a comma at the end of paragraph XIX and adding thereto the following: "particularly in view of the state of the art as disclosed by the following Letters Patent of the United States,

"No. 78,552, granted to George W. Thompson, June 2, 1868.
No. 106,869, granted to William H. Phinney, Aug. 30, 1870.
No. 136,744, granted to Edgar M. May, March 11, 1873.
No. 328,804, granted to John W. Palmer and Marcus E. Taylor, October 20, 1885.
No. 330,690, granted to Lyman B. Gibson and Plyna Evans, November 17, 1885.
No. 421,805, granted to Charles Montgomery Babcock, February 18, 1890.
No. 514,475, granted to Lutie Florence Kepler, February 13, 1894.
No. 532,129, granted to Edward W. Wise, January 8, 1895.
No. 544,345, granted to Charles L. Buckingham, August 13, 1895, on an application filed April 16, 1894."

(2) By changing the period to a comma at the end of paragraph XX and adding thereto the following: "particularly in view of the state of the art as disclosed by the following letters patent of the United States,

"No. 106,869, granted to William H. Phinney, August 30, 1870.
No. 212,789, granted to Franklin N. Chase, March 4, 1879.
No. 312,014, granted to Henry Pottin, February 10, 1885.
No. 383,006, granted to John H. Patterson, May 15, 1888.
No. 398,625, granted to William Koch, February 26, 1889.
No. 410,389, granted to Lucius L. Wands and Hewitt Boice, September 3, 1889.
No. 421,805, granted to Charles Montgomery Babcock, February 18, 1890.

No. 438,753, granted to MacPhelps, October 21, 1890.
No. 445,959, granted to the Lovell Manufacturing Company, Limited, assignee of Melvin N. Lovell, February 3, 1891.
No. 468,329, granted to Charles Carr, February 9, 1892.
No. 510,948, granted to Charles L. and Perry C. Woods, and Samuel H. Armstrong, December 19, 1893.
No. 535,965, granted to John Henry Swihart, March 19, 1895.
No. 538,981, granted to Frank L. Stewart, William T. Lamoreaux and Allen P. Collar, May 7, 1895.
No. 545,616, granted to Albert U. Smith and Edmond C. Smith, September 3, 1895, and reissued to the same parties April 28, 1896, No. 11,536.
No. 585,467, granted to Frederick Lincoln Fuller, June 29, 1897.
No. 588,128, granted to Calvin F. Christopher and Colonel K. Christopher, August 17, 1897.
No. 589,602, granted to Frank C. Hoyt, September 7, 1897, upon an application filed October 3, 1896.
No. 600,837, granted to Baxter Lyon and Charles R. Bromley, March 15, 1898.".

(3) By changing the period at the end of paragraph XXII to a semi-colon and adding the following: "at St. Louis, Missouri, by John H. Milburn, then of St. Louis, Missouri, but now, as defendant is informed and believes, of Detroit, Michigan; at Beaver Falls, Pennsylvania, by John W. Culmer, then of Beaver Falls, Pennsylvania, but now, as defendant is informed and believes, of Cleveland, Ohio."

(4) By changing the period to a semi-colon at the end of paragraph XXIII and adding thereto the following: "and by John H. Milburn, then of St. Louis, Missouri, but now residing at Detroit, Michigan, who was using due diligence in perfecting the same and reducing it to practice; and by Charles L. Buckingham, then and now, as defendant is informed and believes, residing at New York, New York, who was using due diligence in perfecting the same and reducing it to practice."

(5) By adding to paragraph XXIV the following:
"No. 78,552, granted to George W. Thompson, June 2nd, 1868.
No. 136,744, granted to Edgar M. May, March 11th, 1873.
No. 328,804, granted to John W. Palmer and Marcus E. Taylor on October 20th, 1885.
No. 330,690, granted to Lyman B. Gibson and Plyna Evans, on November 17th, 1885."

(6) By changing the period to a semi-colon at the end of paragraph XXVI and adding the following: "and by Frederick Lincoln Fuller, then and now, as defendant is informed and believes, residing at Trenton, New Jersey, and by Union Computing Machine Company, then and now, as defendant is informed and believes, a corporation of New Jersey with its principal office and place of business at Trenton in said state."

(7) By adding to paragraph XXVII the following:
"212,789, granted to Franklin N. Chase, March 4th, 1879.
388,006, granted to John H. Patterson, May 15th, 1888.
398,625, granted to William Koch, February 26th, 1889.
445,959, granted to Lovell Manufacturing Company, Ltd., assignee of Melvin N. Lovell, February 3rd, 1891.
468,329, granted to Charles Carr, February 9th, 1892.
510,948, granted to Charles L. Woods, Perry C. Woods and Samuel H. Armstrong, December 19th, 1893.
539,981, granted to Frank L. Stuart, William T. Lamoreaux and Allen O. Collar.
585,467, granted to Frederick Lincoln Fuller, June 29th, 1897."

(8) By inserting the following paragraph after paragraph XXVII:

XXVIII.

"It avers on information and belief, that the said Albert U. Smith was not the original and first inventor of the subject-matter of said letters patent No. 597,300, but that prior to his alleged invention thereof said subject-matter had been invented by Calvin F. and Colonel K. Christopher, then and now, as defendant is informed and believes, residing at Spartansburg, South Carolina, who were using due diligence in perfecting the same and reducing it to practice; and by Baxter Lyon, then and now, as defendant is informed and believes, residing at Providence, Rhode Island, who was using due diligence in perfecting the same and reducing it to practice."

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

Complainant agrees that the above amendment may be entered nunc pro tunc.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Solicitors for Complainant.

Chicago, May 21, 1912.
Filed May 22, 1912.

CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company,
Complainant,
vs.
Toledo Computing Scale Company,
Defendant.
} In Equity. No. 30,024.

REPLICATION.

This replicant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which can or may be had or taken to the manifold errors, insufficiencies and uncertainties of the answer of said defendant, for replication thereunto says:

That it does and will ever maintain its bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the answer of said defendant is uncertain, untrue, and insufficient to be replied unto by this replicant; without this that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is, and will be, ready to aver, maintain and prove, as this Honorable Court shall direct, and prays as in and by its said bill it has already prayed.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Counsel for Complainant.

COMPLAINANT'S PRIMA FACIE TESTIMONY.

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company.
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024.

Testimony taken on behalf of complainant, under the 67th Rule in Equity, as amended, before Annie C. Courtenay, a Notary Public in and for the County of Cook, in the State of Illinois, acting as Special Examiner, by consent, at the offices of Messrs. Sheridan, Wilkinson, Scott & Richmond, Rooms 1531-35 Marquette Building, Chicago, Illinois, Wednesday, March 29, 1911, beginning at 2 o'clock P. M.

Present: Walter A. Scott, Esq., for complainant; Edward Rector, Esq., for defendant.

Stipulated that any Notary Public not disqualified by interest or relationship to the parties may act as Special Examiner, under the Equity Rules in the introduction of proofs in said cause; that uncertified printed Patent Office copies of United States letters patent and regular printed copies of foreign patents may be received in evidence and used in said cause with the same force and effect as duly certified copies of such patents, subject to correction of any errors that may thereafter appear; and that all exhibits introduced in evidence may be retained in the possession of the party introducing them, subject to inspection by the opposing party at any time, and subject to their production at any session of testimony, and at any hearing of the cause.

And thereupon the complainant's counsel offers in evidence a certified copy of reissued letters patent of the United States No. 11,536, granted April 28, 1896, to Albert U. Smith, of Seymour, Conn., assignor of one-half to Edmond C. Smith, of Westport, Conn., and requests the Notary to mark the same "Complainant's Exhibit Reissued Patent in Suit."

Complainant's counsel also offers in evidence a certified copy of letters patent of the United States, No. 597,300, granted January 11, 1898, to Albert U. Smith, of Saugatuck, Conn., assignor to the E. C. Smith Company, of same place,

and requests the Notary to mark the same "Complainant's Exhibit Patent 597,300 in Suit."

Complainant's counsel also offers in evidence an exemplified copy of the Articles of Incorporation of The Computing Scale Company, a corporation organized and existing under the laws of the State of Ohio, and the complainant in this cause, and requests the Notary to mark the same "Complainant's Exhibit Articles of Incorporation."

Complainant's counsel also offers in evidence a certified copy of the record in the United States Patent Office, said record being a copy of an instrument in writing executed by Albert U. Smith and Edmond C. Smith, assigning the entire right, title and interest in and to reissued letters patent No. 11,536, dated April 28, 1896, to The E. C. Cmith Company, and requests the Notary to mark the same "Complainant's Exhibit Assignment A."

Complainant's counsel also offers in evidence a certified copy of the record in the United States Patent Office, said record being a copy of an instrument in writing executed by The E. C. Smith Company, assigning the entire right, title and interest in and to reissued letters patent No. 11,536 and letters patent No. 597,300, dated April 28, 1896, and January 11, 1898, respectively, to The Boston Computing Scale Company, and also assigning to said Company certain other patents and inventions, and requests the Notary to mark the same "Complainant's Exhibit Assignment B."

Complainant's counsel also produces an original instrument in writing executed by The Boston Computing Scale Company, and duly acknowledged before a Notary Public, said instrument assigning to The Computing Scale Company, of Dayton, Ohio, an Ohio corporation, sundry patents and inventions, including reissued letters patent of the United States No. 11,536, dated April 28, 1896, and letters patent of the United States No. 597,300.

It is stipulated that a copy of the assignment last produced may be introduced in evidence and may have the same force and effect as the original would have if so introduced, it being agreed that the original instrument will be produced at any time during the progress of the suit when its production is requested. Counsel for complainant produces a copy of said assignment, and requests the Notary to mark the same "Complainant's Exhibit Assignment C."

By Mr. Rector: Defendant's counsel, while agreeing to the stipulation which has been entered of record respecting "Complainant's Exhibit Assignment C," objects to the intro-

duction in evidence of the papers marked "Complainant's Exhibit Assignment A" and "Complainant's Exhibit Assignment B" as secondary evidence, and as incompetent and insufficient to prove the execution, delivery, or existence of the documents of which they purport to be a record.

GEORGE H. ROBBINS, a witness produced, sworn and examined on behalf of complainant, deposes and testifies as follows:

Q. 1. What is your name, age, residence and occupation?
A. George H. Robbins; 39 years; 4923 Winthrop avenue; salesman for the Moneyweight Scale Company.
Q. 2. Is this the Moneyweight Scale Company which is the complainant in this suit in which you are testifying?
A. Yes, sir.
Q. 3. How long have you occupied the position of salesman?
A. Since January, 1909.
Q. 4. In what locality have you acted as salesman?
A. In Chicago and vicinity.
Q. 5. In the course of your duties have you become familiar with competing makes of scales?
A. Yes, sir.
Q. 6. Will you name some of the competing scales which you have become familiar with?
A. The Toledo scale and the Angledile scale.
Q. 7. I call your attention to some scales in this room, and ask you if you are familiar with them?
A. Yes, sir.
Q. 8. I call your attention to this one, and ask if that is one which you have met in competition?
A. Yes, sir.
Q. 9. Have you any knowledge as to the sale of the scale to which you have referred between January, 1909, when you were employed by the Moneyweight Scale Company, and the month of May, 1910, the scale referred to being, I believe, one made by the Toledo Computing Scale Company?
A. Yes, sir.
Q. 10. Will you please examine the scale more closely and assure yourself as to by whom you understand it to have been made and sold?
A. By the Toledo Computing Scale Company.

Q. 11. In stating that you know of scales, such as the Toledo scale referred to, having been sold during the period mentioned in the preceding question, do you refer to your knowledge of the sale of this particular scale or to your knowledge of similar scales?

A. I refer to a knowledge of similar scales.

Q. 12. Please state whether you have knowledge of the sale of scales of the precise pattern of the one referred to, or merely of one somewhat similar thereto.

A. I have a knowledge of an exact pattern of the scale referred to.

Q. 13. Do you mean knowledge of that pattern having been sold between the dates previously mentioned?

A. Yes, sir.

Q. 14. Please state where the sale of such scale or scales took place.

A. In Chicago.

The scale referred to by the witness is introduced in evidence as "Complainant's Exhibit Defendant's Scale."

Q. 15. I direct your attention to another scale, and ask you to state whose make it is.

A. That scale is made by the Dayton Computing Scale Company.

Q. 16. And have you a knowledge of who sells these scales to the ultimate user?

A. The scale is sold by the Moneyweight Scale Company.

Q. 17. I notice that the scale last referred to is marked "Patented September 3, 1895; reissued Apr. 28, '96. Pat. Jan. 11, '98, Apr. 24, '00, May 28, '01, June 18, '01, May 19, '03, December 6, '04." Will you state whether, if you know, the scales sold by you for the Moneyweight Company have been similarly marked during the period of your employment by that company and prior to the month of May, 1910?

A. Yes, sir, they were.

The scale last referred to by the witness is introduced in evidence as "Complainant's Exhibit Complainant's Scale."

Direct examination closed.

By Mr. Rector: Before proceeding with the cross-examination of the witness, defendant's counsel desires to inquire of complainant's counsel what claims of the several patents in suit will be relied on and alleged to be infringed by defendant's scales?

By Mr. Scott: Complainant will ask for a decree on claim 2 of patent 597,300, and claims 5 and 6 of reissued patent No. 11,536.

Cross-Examination by Mr. Rector.

XQ. 18. Mr. Robbins, when did you first see the scale which has been introduced in evidence here as "Complainant's Exhibit Defendant's Scale"?

A. Three or four days ago.

XQ. 19. Where did you see it at that time?

A. In this office.

XQ. 20. Who called it to your attention?

A. Mr. Scott.

XQ. 21. What examination did you make of it?

A. Only a slight examination, which showed that it was the Toledo make of barrel-shaped scale.

XQ. 22. When did you next see this scale?

A. When I came in this office a few minutes ago.

XQ. 23. What further examination, if any, have you made of this scale since coming here at this time?

A. Just a casual observance of the type of scale.

XQ. 24. Which examination consisted in simply stepping over in front of the scale and glancing at it, did it not?

A. Yes, sir.

XQ. 25. I notice that the end plate or cap has been removed from one of the ends of the barrel or cylinder portion of the housing of this scale. When, if you know, was that done?

A. I do not know.

XQ. 26. Had it been removed at the time you first saw the scale here three or four days ago?

A. Yes, sir.

XQ. 27. When and where did you ever see a scale similar to this "Complainant's Exhibit Defendant's Scale" actually sold?

A. I did not see the actual sale transpire.

XQ. 28. State what you did see.

A. Men on whom I have called and endeavored to sell a Dayton Moneyweight scale to and have failed, and later saw a similar type of scale, to which we have referred, in use by said customer.

XQ. 29. And you simply concluded, did you, from the facts which you have stated that such persons had bought the scales which you subsequently saw them using?

A. Yes, sir.

XQ. 30. Did you ever, in any such instance, remove from any such scale which such a person was using either of the end plates or caps of the barrel or cylinder portion of the

housing of the casing, as has been done in the case of this exhibit scale here?

A. I did not.

By Mr. Rector: In view of the foregoing cross-examination of the witness, defendant's counsel here enters objection to so much of his direct examination as purports to establish, upon the personal knowledge of the witness, any sales of scales similar to "Complainant's Exhibit Defendant's Scale" by the defendant in this case, and also objects to the introduction in evidence of "Complainant's Exhibit Defendant's Scale" on the ground that said scale has not been identified with any scales made, used or sold by the defendant in this case, and as therefore being irrelevant and immaterial for any issue therein.

In order to avoid expense and delay, and in view of the well known fact that scales like "Complainant's Exhibit Defendant's Scale" have been sold and are being used in the Eastern Division of the Northern District of Illinois, defendant's counsel is invited to stipulate that scales like "Complainant's Exhibit Defendant's Scale" have been sold by the Toledo Computing Scale Company, party defendant, in the Northern District of Illinois, Eastern Division, between January 11, 1898, and the month of May, 1910.

By Mr. Rector: Defendant's counsel has no personal knowledge of the facts stated by complainant's counsel which would warrant him in making any such stipulation, and must therefore decline the invitation to do so.

Deposition closed.

GEORGE H. ROBBINS.

Adjourned until April 1, 1911, at 10 o'clock A. M.

Chicago, April 1, 1911.

Parties met pursuant to adjournment. Present as before.

HARVEY ANDERSON, a witness produced, sworn and examined on behalf of complainant, deposes and testifies as follows, in answer to interrogatories by Mr. Scott:

Q. 1. Please state your name, age, residence, and occupation.

A. Harvey Anderson; 37 years; 6240 Vernon avenue; I am a salesman.

Q. 2. For whom are you a salesman?

A. For no one at present.

Q. 3. By whom are you employed at present?

A. No one just now.

Q. 4. What was your last employment?

A. I was Chicago office manager for the Toledo Computing Scale Company.

Q. 5. Are you employed by that company in any capacity at the present time?

A. No, sir.

Q. 6. When did your connection with that company cease?

A. I don't remember the date, but I think it was some time in January, 1911.

Q. 7. Are you familiar with the product which is made and sold by that company?

A. Yes, sir.

Q. 8. Will you please state what the product made and sold by that company is?

A. Computing scales.

Q. 9. Will you describe briefly, that is, name the general styles of scales sold by that company?

A. Well, they manufacture confectionery, grocery, butcher and computing scales for use in general retail stores.

Q. 10. Please describe generally the nature of the computing arrangement upon these scales.

A. On the grocery scale the prices per pound at which commodities are sold are placed on an indicating hand, which travels across the chart having the values thereon. On the butcher or cylinder scale the prices per pound are indicated in an opening in front of the cylinder or drum, and the values are indicated on a chart which revolves within the drum or casing, the platform on which the goods are placed being directly in front of the indication.

Q. 11. Do you know about how long the Toledo Computing Scale Company has made and sold the scale which you describe as a butcher's or cylinder scale?

A. I should say, to the best of my knowledge, about five years.

Q. 12. Please state the date when you first entered the employ of the Toledo Computing Scale Company.

A. September, 1902.

Q. 13. Were you employed by the Toledo Computing Scale Company continuously from September, 1902, until January, 1911?

A. Yes, sir.

Q. 14. Please state in what capacity you worked for them

during that period, beginning with September, 1902, when you entered their employ.

A. As salesman and office manager.

Q. 15. Did you work in Chicago all of this time?

A. No.

Q. 16. Please state the different places in which you worked, and approximately the amount of time in each place.

A. I sold scales in Chicago for the Toledo Computing Scale Company for about three years, and in the State of Illinois about two and a half years; in the State of Wisconsin about one year. The balance of the time up to January, 1911, I was office manager of the Chicago office.

Q. 17. In your preceding answer have you named the places where you worked in the order in which you worked in those places, beginning with September, 1902?

A. Yes, sir.

Q. 18. Do you remember where you were working when the Toledo Computing Scale Company first, to your knowledge, made and sold a scale of the kind to which you have referred as a butcher's or cylinder scale?

A. I was selling scales in the State of Illinois.

Q. 19. That was after you had left Chicago and started to sell scales in the state, was it?

A. Yes, sir.

Q. 20. Referring, then, to your answer to Q. 16, about what year was it, to your knowledge, that the Toledo Computing Scale Company first manufactured and sold the scale which you have referred to as a butcher's or cylinder scale?

A. I should say about 1905 or 1906.

Q. 21. Do you remember the name or style number of the first butcher's or cylinder scale which, to your knowledge, the Toledo Computing Scale Company manufactured and sold?

A. It was first known as Style No. 300.

Q. 22. Please state the name or style number of any other butcher's or cylinder scales which the Toledo Computing Scale Company has made and sold, to your knowledge.

A. Nos. 344, 345, 346, 347, 348, 381, 382, 383, 384, 385; Nos. 81, 82, and, I think, No. 83.

Q. 23. After the first introduction of these different styles to which you have referred, was each of the styles manufactured and sold subsequently in the same form as when first introduced?

A. They were sold in the same form, the only difference being in the capacity of the scale and the price range.

Q. 24. Do you remember when Style No. 345 was first manufactured and sold?

A. No, I can't say at this time just when it was placed on the market.

Q. 25. Can you say whether it was as early as January 1, 1910?

A. Yes, it was earlier than that.

Q. 26. Have you any knowledge as to the sale of scales of the style designated 345 in the City of Chicago prior to the month of May, 1910, and subsequent to the month of January, 1898?

A. No.

Q. 27. What styles of scales were sold through the Chicago office of the Toledo Computing Scale Company while you were employed as office manager; I mean cylinder or butchers' scales?

A. Nos. 81, 82, 345, 346, 347, 348, 381, 382, 383, 384 and 385.

Q. 28. I call your attention to Q. 26, for the purpose of asking whether you understood it. I do so in view of your answer to Q. 27.

A. My understanding of Q. 26 was as to the quantity sold, not as to the style number sold.

Q. 29. Do you know of the sale by the Toledo Computing Scale Company in Chicago of Style No. 345 scales during the period between January, 1898, and May, 1910?

A. Yes, sir.

Q. 30. Please state whether or not such scales were sold in the year 1909.

A. Yes, sir.

Q. 31. Will you please describe a little more in detail the cylinder or butcher's scales to which you have referred, directing your answer particularly to the manner in which the weight, values, and price per pound are indicated and read. In your answer you may, if you desire, state whether the scale which is at present in this room is one that you can identify.

A. The scale in this room is known as Style No. 345, and has a capacity of twenty pounds, and a price range from 4 to 32 cents per pound. The commodity to be weighed is placed upon the platform, which is directly in front of the scale, and the value is given directly above the price per pound by the amount, whichever it happens to be, which is bisected by a red line.

Q. 32. In this scale, which has previously been designated

"Complainant's Exhibit Defendant's Scale," will you state what provision is made for reading the weight of the goods?

A. There is an opening in the back of the scale, or customer's side, which indicates the amount purchased in pounds and ounces only.

Q. 33. Is this the only manner of reading the weight?

A. No, the weight is also indicated on the front part of the scale, or the side used by the merchant.

Q. 34. Do you know how the scale is made so as to enable a reading to be taken from either side, that is, how the weight indications are arranged?

A. There are two rows of weight indications, one running one way and one the other.

Q. 35. Can both rows of weight indications be seen from one side of the scale?

A. No.

Q. 36. Please state briefly, if you can, how the scale is arranged so that both rows of weight indications cannot be seen from the same side of the scale.

A. The row of figures or weight indications which is covered up on the front of the scale is exposed in the opening on the back.

Q. 37. Has this arrangement of a double row of weight indications—one running one way and one running the other —and the arrangement whereby the row which is covered at the front of the scale is exposed through the opening at the back been changed or altered in any way since the first introduction of Style No. 345 scale?

A. Not that I know of.

Q. 38. I understand, then, that it is your understanding that this arrangement has been the same ever since the Style 345 has been introduced; is that correct?

A. That is correct.

Q. 39. Did your duties while employed by the Toleda Computing Scale Company result in your becoming familiar with the construction and operation of their various styles of scales, and more particularly the construction and operation of the No. 345 scale?

A. Yes.

Q. 40. I invite your attention to "Complainant's Exhibit Defendant's Scale," one end of the cylindrical casing of which has been removed, and ask you whether the construction of the rotating cylinder in te exhibit scale is the same or different from the rotating cylinders which form the parts of the first No. 345 scales with which you became familiar?

A. No, the construction is not different.

Q. 41. Are you familiar with any platform cylinder scale of the general type of "Complainant's Exhibit Defendant's Scale" other than those made by the Toledo Computing Scale Company?

A. Yes.

Q. 42. By whom, if you know, are such other platform cylinder scales made and sold?

A. They are made by The Computing Scale Company, of Dayton, Ohio, and sold by the Moneyweight Scale Company, of Chicago.

Q. 43. When, approximately, did you first learn of the manufacture and sale of these competing platform cylinder scales?

By Mr. Rector: The question is objected to as irrelevant and immaterial, it being wholly immaterial to any issue in this case what scales the two companies mentioned may have made or sold, or when they may have made or sold them.

A. About 1901.

Q. 44. As I understand your testimony, then, you knew of a platform cylinder scale being made by the Computing Scale Company of Dayton, and sold by the Moneyweight Scale Company of Chicago, several years before such a scale was made and sold by the Toledo Computing Scale Company; is this correct?

A. Yes.

By Mr. Rector: Same objection as to preceding question.

By Mr. Scott: The question is believed to be relevant and material, as is the answer thereto, by reason of its bearing upon the quality of the infringement charged in this suit and its bearing upon the question, whether such infringement was deliberately in disregard of complainant's rights.

Q. 45. Will you compare the structure of the platform cylinder scale made by The Computing Scale Company of Dayton, and sold by the Moneyweight Scale Company of Chicago, with the structure of "Complainant's Exhibit Defendant's Scale," directing your answer to similarities or differences between the manner of indicating and reading the weight, and similarities or differences between the weight of the rotating drum bearing the value and weight indications?

By Mr. Rector: The question is objected to as irrelevant and immaterial, and as calling for secondary evidence.

A. The manner of reading the weight and values are practically the same; the manner of rotating the drum is the

same, with the exception that in the Dayton scale two ratchets are used, and in the Toledo but one.

Q. 46. How about the construction of the rotating drum itself?

By Mr. Rector: Same objection as to preceding questions.

A. As far as I know there is no difference in the construction of the drum.

Q. 47. At the time the platform cylinder scale of The Computing Scale Company of Dayton and the Moneyweight Scale Company of Chicago was put upon the market and first brought to your attention, did you or did you not have occasion to familiarize yourself with the construction and operation?

By Mr. Rector: The question is objected to as irrelevant and immaterial.

A. No, I had a general idea as to how it was constructed.

Q. 48. Please state, if you know, what caused the Toledo Computing Scale Company to manufacture and sell a platform cylinder scale, such as you have referred to?

By Mr. Rector: The question is objected to as irrelevant and immaterial, and as calling for the mere opinion or conclusion of the witness, and as relating to matters manifestly beyond his personal knowledge.

A. I don't know.

Q. 49. In your work as salesman prior to the manufacture and sale by the Toledo Computing Scale Company of a platform cylinder scale, similar to "Complainant's Exhibit Defendant's Scale," did you meet in competition the platform cylinder scale made by The Computing Scale Company of Dayton, and sold by the Moneyweight Scale Company of Chicago?

By Mr. Rector: Objected to as irrelevant and immaterial.

A. Yes.

Q. 50. Was this competition such as to prevent you from making sales which you might otherwise have made?

Same objection as to preceding questions.

A. No, I have always sold where I have been in competition with The Computing Scale Company of Dayton, Ohio, or the Moneyweight Scale Company of Chicago.

Q. 51. Do you mean by your answer that you have been successful in every instance in whch you have attempted to sell a scale in competicion with The Computing Scale Company of Dayton, or the Moneyweight Scale Company of Chicago?

Same objection.

A. I can't remember a case where I have not been successful, and I have been in competition with them a good many times.

Q. 52. Have you any knowledge as to whether the other salesmen of the Toledo Computing Scale Company were as invariably successful as yourself?

Same objection.

A. Yes, I believe they were, at least those that I have been acquainted with.

Q. 53. Do you mean by your answer to convey the idea that so far as you have learned in your positions as salesman and Chicago office manager for the Toledo Computing Scale Company you have never known of any salesman losing a sale to a customer when in competition with the Moneyweight Scale Company or The Computing Scale Company of Dayton?

Same objection.

A. I can't remember any specific case.

Q. 54. Have you any general recollection of such cases?

A. No.

Same objection.

Q. 55. How did you first learn of the manufacture and sale by The Computing Scale Company of Dayton and the Moneyweight Scale Company of Chicago of platform cylinder scales of the type illustrated in "Complainant's Exhibit Defendant's Scale"?

Same objection.

A. I was employed by them as salesman, and knew of it in that way.

Q. 56. In what year were you employed by them?

Same objection.

A. I think part of 1901 and up to September, 1902.

Q. 57. Were some of the platform cylinder scales sold by The Computing Scale Company of Dayton, or by the Moneyweight Scale Company at that time?

Same objection.

A. Yes, sir.

Q. 58. Have you any knowledge as to whether any of these platform cylinder scales were sold by The Computing Scale Company of Dayton or by the Moneyweight Scale Company after you entered the employ of the Toledo Computing Scale Company?

Same objection.

A. Yes, sir.

Q. 59. Prior to manufacturing and selling the platform cylinder scale, such as illustrated in "Complainant's Exhibit Defendant's Scale," did the Toledo Computing Scale Company manufacture and sell any scale which could have been used to perform the service performed by the platform cylinder scale manufactured and sold by The Computing Scale Company of Dayton and the Moneyweight Scale Company of Chicago?

By Mr. Rector: The question is objected to as irrelevant and immaterial, and as calling for the mere opinion or conclusion of the witness.

A. Yes.

Q. 60. Then, as I understand your testimony, in stating that to your knowledge none of the salesmen of The Computing Scale Company of Dayton or the Moneyweight Scale Company of Chicago, were successful in competition in any case with which you are acquainted when opposed by salesmen of the Toledo Computing Scale Company, is meant to convey the idea that so far as you know, the platform cylinder scales of The Computing Scale Company of Dayton and the Moneyweight Scale Company were sold in cases where the Toledo Computing Scale Company did not compete; is this correct?

By Mr. Rector: Objected to as irrelevant and immaterial.

A. I can't say as to that.

Q. 61. Then you are not positive, as I understand it, that the platform cylinder scale of The Computing Scale Company of Dayton, and Moneyweight Scale Company may not in some instances have been preferred by customers to the scales made and sold by the Toledo Computing Scale Company, both before and after they put out the platform cylinder scale?

Same objection.

A. I can't say whether it would be preferred or not.

Q. 62. Please state how you happened to come here today to testify.

A. I was served with a summons by the United States marshal.

By Mr. Scott: It is believed that the foregoing questions and answers to which objection has been taken are relevant and material in their bearing upon the quality of the infringement charged in this case.

Q. 63. Do you expect to again enter the employ of the Toledo Computing Scale Company?

A. I may.

Q. 64. When your connection with them was severed in January, 1911, was it the understanding that you had permanently left their employ?

A. No.

Q. 65. Are you now, or have you since January, 1911, been receiving a salary or other remuneration from the Toledo Computing Scale Company?

A. I received a commission on some sales that I made for them.

Q. 66. Were the sales made before or after your connection as office manager of the Toledo Computing Scale Company ceased?

A. After.

Q. 67. Then, as I understand it, you are still acting in the interests of the Toledo Computing Scale Company upon a commission basis; is this correct?

A. Yes.

Q. 68. What is the arrangement as to remuneration which prevails with other salesmen of the Toledo Computing Scale Company—salary or commission?

A. Commission.

Q. 69. Then, as I understand it, you are still in the employ of the Toledo Computing Scale Company in the same sense that any of its salesmen are; is this correct?

A. No.

Q. 70. What is the difference between your relation to the company and that of the other salesmen in Chicago?

A. The other salesmen have been allotted certain territory in which to work, and have a signed contract with the company. I have not.

Cross-Examination by Mr. Rector.

XQ. 71. Mr. Anderson, when did you first see the scale which is here present, marked "Complainant's Exhibit Defendant's Scale"?

A. I think it was either in 1905 or 1906.

XQ. 72. I intended to inquire when you first saw this particular scale which is here present and bears No. 46,741. Did you so understand my question; if not, will you please answer it with that understanding?

A. I did not understand that you meant this particular scale, and have no knowledge of ever having seen it before this morning.

XQ. 73. When did you first learn that your testimony was desired in this case?

A. March 31, 1911.

XQ. 74. And how did you learn yesterday that your testimony was desired?

A. I was summoned by the United States Marshal.

XQ. 75. That was the first information or intimation of any kind that you had on the subject, was it?

A. Yes, sir.

Deposition closed.

HARVEY ANDERSON.

I, Annie C. Courtenay, a Notary Public in and for the County of Cook, in the State of Illinois, and Special Examiner by agreement, hereby certify that all the proceedings aforesaid were had as stated in the cause named in the caption hereto; that on the 29th day of March, 1911, and subsequent days mentioned in the foregoing depositions, I was attended by Mr. Walter A. Scott, counsel for complainant, and Mr. Edward Rector, counsel for defendant, and by the witnesses, Messrs. George H. Robbins and Harvey Anderson; that before giving their depositions the said witnesses were by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in said cause; and that their depositions were taken down by me in typewriting from their statements and afterwards read over and subscribed by them as and for their depositions in said cause; and that I am not related to or of counsel for either of said parties, or in any way interested in the result of said suit.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 5th day of April, A. D. 1911.

ANNIE C. COURTENAY,

(Notarial Seal.) *Notary Public.*

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company,
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024.

NOTICE.

Notice is hereby given that we shall proceed to take proofs for final hearing on the part of the above named complainant, under the 67th Rule of the Supreme Court for courts in equity, as amended, or in accordance with the statutes in such case made and provided, and in pursuance with the rules of practice of this court, before R. G. Corwin, a Notary Public in and for Montgomery County, Ohio, or other proper officer, under said statutes and rules, at the offices of McMahon & McMahon, McIntire Building, Dayton, Ohio, on the 4th day of August, 1911, at 11 o'clock in the forenoon.

The names and the residences of the witnesses who live at a greater distance than 100 miles from the place of trial, whom it is intended to examine, are as follows:

Isaac G. Kennedy, Dayton, Ohio,
Joseph Hopkinson, Dayton, Ohio,
George W. Kepler, Dayton, Ohio,

and others.

You are invited to attend and cross-examine any witnesses produced. The examination will adjourn from day to day.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Complainant's Solicitors.

Chicago, July 31, 1911.

To Messrs. Rector, Hibben, Davis & Macauley,
McCormick Building,
Chicago, Ill.

Service of the above notice acknowledged this 31st day of July, 1911.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Defendant's Solicitors.

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *vs.* Toledo Computing Scale Company. } In Equity. No. 30,024.

Testimony taken on behalf of complainant, pursuant to notice hereto attached, before R. G. Corwin, a Notary Public in and for Montgomery County, Ohio, acting as Special Examiner by consent, at the offices of Messrs. McMahon & McMahon, McIntire Building, Dayton, Ohio, Thursday, August 3rd, 1911, beginning at 10 o'clock A. M.

Present:

Walter A. Scott, for complainant;
Frank P. Davis, for defendant.

JOSEPH HOPKINSON, witness, being first duly sworn, deposes and says:

Examined by Mr. Scott.

Q. 1. Please give your name, age, residence and occupation.

A. Joseph Hopkinson; 45; Dayton, Ohio; superintendent of The Computing Scale Company, Dayton, Ohio.

Q. 2. What was the first automatic cylinder computing scale which you ever saw or had knowledge of?

A. A hanging drum scale, made by A. U. Smith, of Saugatuck, Conn.

Q. 3. What connection did The Computing Scale Company of Dayton have with the scale you have referred to, if they had any?

A. The Computing Scale Company of Dayton, Ohio, bought the hanging drum scale made by A. U. Smith, of Saugatuck, Conn.

Q. 4. I hand you the patents in suit, No. 597,300 and reissue 11,536, and ask you to compare the scales therein illus-

trated with the scales referred to by you in answer to question 2.

A. The scale illustrated in patent No. 597,300 is the scale I saw first. The scale illustrated in patent No. 11,536 I remember seeing afterwards.

Q. 5. State whether these Smith scales, as you first saw them, were provided with any means for lessening the oscillation when an object was placed upon the pan.

Objected to as immaterial and irrelevant, and as this line of examination appears to have no relevancy or materiality at all as any part of complainant's prima facie case, all of the testimony so far given is objected on these grounds.

A. The Smith hanging drum scale that I first saw was provided with two air dash-pots, one on each side of the scale.

Q. 6. Did you ever see or know of an automatic cylinder computing scale manufactured and sold by others than the owners of the Smith patent?

A. No, sir.

Q. 7. I refer to any date in my question, either before or after you saw the Smith scales?

A. I saw in the year 1904 or 1905 an automatic platform drum scale manufactured by the Toledo Computing Scale Company.

Q. 8. Will you compare the construction of the revolving drum, forming part of the hanging drum scale made by A. U. Smith, with the construction of the revolving drum forming part of the platform drum scale manufactured by the Toledo Computing Scale Company.

Objected to as incompetent, because Complainant's Exhibit Defendant's Scale, introduced by complainant as representing the specific construction complained of, is not at hand.

A. The revolving drum in the Smith scale was made up of a rod journaled at each end; fastened to this rod were three aluminum spiders and a paper chart secured around the peripheries of the three aluminum spiders mentioned. On each end of the rod and near the journals there was secured two pinions, one on each end. The drum in the scale made by the Toledo Computing Scale Company was made up of a rod journaled at each end, and on this rod was secured spiders made of aluminum. Around the peripheries of these spiders a paper chart was securely attached. On one end of the rod a pinion was secured near the journal.

Further objection is made to above question and answer on the ground that it is immaterial what the construction of the Smith scale that the witness saw may have been, i. e., the construction of the physical thing, irrespective of the constructions disclosed in the patents in suit.

Mr. Scott: The questions and answers objected to are considered relevant, in that in connection with other testimony to be introduced it will be shown that the construction adopted in the Smith scales became widely successful and as a result of this success was adopted by defendant. This testimony has a distinct relevancy to the quality and the character of the infringement of the patents, as shown by other witnesses already examined and to be examined.

Mr. Davis: The objections are insisted upon, it being obvious that the predicated testimony of the character mentioned would be as irrelevant and immaterial as that which the witness is now being called upon to give. Furthermore, exception is taken to the statement by counsel for complainant in the presence of the witness as to what it is proposed to show by other witnesses, this being obviously improper, as leading and instructive to the witness.

Q. 9. When was it that you first saw the Smith scales which you mention in answer to question 2?

Objected to as immaterial and irrelevant.

A. In the early part of 1899.

Q. 10. Was the Toledo scale which you have mentioned the first automatic cylinder computing scale which you learned of other than the automatic cylinder computing scales made by the owners of the Smith patents in suit?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. 11. How long have you been engaged in the scale business, and in what capacity?

A. I first entered the employ of The Computing Scale Company in November, 1894, as draftsman; later taking up the position as scale inspector; then taking the position as draftsman, following with a position in charge of the experimental drawing room; following this position as assistant superintendent; and since about August, 1902, until the present time I have occupied the position of superintendent.

Q. 12. What other type of automatic computing scale do you know of besides the automatic cylinder computing scale,

my question referring especially to the mode of exhibiting the price and value indications?

Objected to as immaterial and irrelevant.

A. In the years 1896, 1897 and 1898 the Computing Scale Company was making an automatic computing scale known as No. 20. We also commenced to make a No. 63 automatic computing scale, and automatic computing scales on the market at the present time are scales made by the Toledo Computing Scale Company, the Angle Dial Scale Company, and one or two others that I don't just know their correct name.

Q. 13. Does the Toledo Computing Scale Company, to your knowledge, make and sell any form of automatic computing scale other than the cylinder scale which you have referred to?

Objected to as immaterial and irrelevant.

A. The Toledo Computing Scale Company are now making and selling an automatic computing scale known as their fan-shaped scale.

Q. 14. I hand you a copy of reissue patent 12,137, granted to Allen DeVilbiss, Jr., July 28th, 1903, and ask you to compare the scale therein illustrated to the fan-shaped scale of the Toledo Computing Scale Company, to which you have referred.

Objected to as irrelevant and immaterial.

A. The scale illustrated in patent No. 12,137 is very similar in outline and principle to the scale which they are now making and selling, referred to as fan-shaped scale.

Q. 15. When, to your knowledge, did the Toledo Computing Scale Company first put the fan-shaped scale upon the market?

Objected to as irrelevant and immaterial.

A. To the best of my knowledge, very near to May, 1903. We moved from our Fifth street factory over to our First street factory at this time, and I cannot say positively if I saw this fan-shaped scale before we moved or afterwards.

Q. 16. Did you know of any scale made by the Toledo Computing Scale Company prior to the time they made the fan-shaped scale?

Objected to as irrelevant and immaterial.

A. I remember seeing a scale made by either the Toledo Company or DeVilbiss, with a fan-shaped chart and a swinging platform, before May, 1903.

Q. 17. Will you compare the advantages and disadvantages of the cylindrical chart, such as used in the Smith scale

to which you have referred, with the fan-shaped chart to which you have referred?

Objected to as irrelevant and immaterial.

A. In a drum type of scale it is possible and more convenient to make a scale of a high capacity than it would be on a fan chart.

Q. 18. Why is it more convenient to show large capacities upon a cylindrical or drum chare than a fan chart?

Objected to as irrelevant and immaterial.

A. For instance, the paper chart removed from a drum scale as they are now being made, laid flat, would measure about 26 inches long and 12 to 15 inches wide, and with capacities ranging from fifteen to thirty pounds capacity and higher. Whereas, on a fan chart it has only been found advisable to make the chart about 15 inches wide and 8 or 10 inches deep. In order to get higher capacities on fan-shaped scales it is customary to introduce and attach to the scale beam a slidable poise over a graduated bar.

No cross-examination by Mr. Davis.

The entire deposition is objected to as irrelevant and immaterial, and incompetent, for the reasons hereinbefore stated in the objections noted to questions and answers as put and given.

JOSEPH HOPKINSON.

I, R. G. Corwin, a Notary Public in and for the County of Montgomery, in the State of Ohio, and Special Examiner by agreement, hereby certify that all the proceedings aforesaid were had as stated in the cause named in the caption hereto; that on the 3rd day of August, A. D. 1911, I was attended by Mr. Walter A. Scott, counsel for complainant, and Mr. Frank P. Davis, counsel for defendant; and by Joseph Hopkinson, a witness; that before giving said deposition the said witness was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and that his deposition was taken down in typewriting from his statements and afterwards read over and subscribed by him as and for his deposition in said cause; and that I am not related to or of counsel for either of said parties, or in any way interested in the result of said suit.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 3rd day of August, A. D. 1911.

R. G. CORWIN,
Notary Public in and for Montgomery County, Ohio.

CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois.

Eastern Division.

The Computing Scale Company, *Complainant,* vs. Toledo Computing Scale Company, *Defendant.*	In Equity. No. 30,024 On Reissue Patent No. 11,536, Patent No. 597,300.

Messrs. Rector, Hibben, Davis & Macauley,
McCormick Building, Chicago, Illinois.

Gentlemen:

Please take notice that on Wednesday, August 16, 1911, at 11 o'clock A. M., we shall take the testimony, in behalf of complainant, in the above entitled case, of the following witnesses:

Albert U. Smith,
Edmond C. Smith,
O. I. Allen,
Harry B. Smith,

and others, whose names will be furnished later.

This testimony will be taken in the office of John D. Morgan, 2 Rector street, New York City, New York, before Louella F. Little, a Notary Public. Adjournment will be taken from day to day until the testimony of these witnesses is completed.

You are invited to attend and cross-examine.

Respectfully,
SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Attorneys for Complainant.

Service of the above notice accepted this 12th day of August, 1911.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Attorneys for Defendant.

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024.

Testimony taken on behalf of complainant, pursuant to notice hereto attached, before Louella F. Little, a Notary Public in and for New York County, New York, acting as Special Examiner by consent, at the office of John D. Morgan, No. 2 Rector street, New York, New York, Wednesday, August 16th, at 11 o'clock A. M.

Present:

Walter A. Scott, for complainant;
Frank P. Davis, for defendant.

ALBERT U. SMITH, witness, being first duly sworn, deposes and says:

Q. 1. Please give your name, age, residence and occupation.

A. Albert U. Smith; 51; Westport, Connecticut; manufacturer of computing scales.

Q. 2. Are you the Albert U. Smith to whom the patents in suit were granted, namely, patent 597,300 and reissued letters patent 11,536?

A. I am.

Q. 3. I hand you a paper, a copy of which has been introduced in evidence as "Complainant's Exhibit, Assignment A," and ask you if you can identify the signature thereto as yours?

A. I can.

Q. 4. The name Albert U. Smith as signed to this instrument is your signature, then?

A. It is.

The notary is requested to mark the instrument referred to for identification as "Complainant's Assignment A," and the

said instrument will be produced for inspection at any time during the progress of this suit.

Q. 5. Do you remember the circumstances of assiging reissued patent 11,536 to the E. C. Smith Co. as set forth in this instrument?

A. There was a company formed, E. C. Smith. Don't remember what my office was in the company, and the company together with myself and O. I. Allen. I don't remember any circumstances connected with it any more than it was assigned to the E. C. Smith Co.

Direct examination closed.

No cross-examination.

Signature waived.

E. C. SMITH, witness produced on behalf of complainant, being first duly sworn, deposes and says:

Q. 1. What is your name, age, residence and occupation?

A. Edmond C. Smith; sixty-three; no occupation, retired; Westport, Connecticut, postoffice Saugatuck.

Q. 2. Are you the Edmond C. Smith, the assignee named in reissued letters patent 11,536, which are involved in this suit, a certified copy of which patent I hand you?

A. I am.

Q. 3. I hand you a written instrument purporting to assign reissued letters patent 11,536 to the E. C. Smith Company, a corporation of Connecticut, and ask you whether you executed such an instrument and whether the name Edmond C. Smith, signed thereto is your signature?

A. It is my signature and I executed the instrument.

The paper submitted to the witness is that which the notary was previously requested to mark for identification "Complainant's Assignment A."

Direct examination closed.

No cross-examination.

Signature waived.

O. I. ALLEN, witness being first duly sworn, deposes and says:

Q. 1. Please give your name, age, residence and occupation.

A. Orlando I. Allen; Saugatuck, Connecticut; machinist; age, sixty-five.

Q. 2. I hand you a paper which has been marked for identification "Complainant's Assignment A," and ask if you can identify your signature thereto?

Objected to as assuming that the instrument in question contains the signature of the witness.

A. I do.

Direct examination closed.

No cross-examination.

Deposition closed.

Signature waived.

State of New York, }
County of New York, } ss.

I, Louella F. Little, a notary public, in and for the aforesaid county, and state, duly authorized and acting in the cause hereinafter described by consent of both counsel as Special Examiner, and with all the powers thereof, do hereby certify that on the 16th day of August, 1911, as shown by the record, I was attended by the witnesses Albert U. Smith, E. C. Smith and Orlando I. Allen, who, being duly cautioned and sworn in the cause then pending in the United States Circuit Court, Northern District of Illinois, Eastern Division, wherein the Computing Scale Company is complainant and the Toledo Computing Scale Company is defendant, in Equity No. 30,024, did depose and say by their depositions hereto annexed doth appear.

And I do further certify that Walter A. Scott, Esq., appeared as counsel for complainant and Frank P. Davis as counsel for defendant.

And I do further certify that said deposition was taken down by me on the typewriter, counsel for both parties consenting thereto.

And I do further certify that I am not a counsel for the parties nor am I related by blood or marriage to them, nor am I interested directly or indirectly in the case.

In witness whereof I have hereunto affixed my hand and official seal this 16th day of August, 1911.

LOUELLA F. LITTLE,
Special Examiner.

(Seal)

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company } In Equity.
vs. } No. 30,024.
Toledo Computing Scale Company. }

NOTICE.

Notice is hereby given that we shall proceed to take proofs for final hearing on the part of complainant under the 67th Rule of the Supreme Court for courts of equity, as amended, and in pursuance of the rules of practice of this court, orally before Annie C. Courtenay, a Notary Public, or some other proper officer, at Room 1532 Marquette Building, Chicago, Illinois, on the 11th day of September, 1911, at 10 o'clock in the forenoon.

Your are invited to attend and cross-examine any witness produced. The examination will adjourn from day to day and to such time and place as may be required.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Solicitors for Complainant.

Chicago, Sept. 6, 1911.

To Messrs, Rector, Hibben, Davis & Macauley,
McCormick Building, Chicago.

Service of the above notice acknowledged this 6th day of September, A. D. 1911.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Computing Scale Company
vs.
Toledo Computing Scale Company.
} In Equity. No. 30,024.

Testimony taken on behalf of complainant, under the 67th Rule in Equity, as amended, pursuant to the annexed notice, before Annie C. Courtenay, a Notary Public in and for the County of Cook, in the State of Illinois, acting as Special Examiner by consent, at the offices of Messrs. Sheridan, Wilkinson, Scott & Richmond, 140 S. Dearborn Street, Chicago, Illinois, Monday, September 11, 1911, beginning at 10 o'clock A. M.

Present:

Walter A. Scott, Esq., for complainant;
Frank P. Davis, Esq., for defendant.

GEORGE M. LUDLOW, a witness produced, sworn and examined on behalf of complainant, deposes and testifies as follows in answer to questions by Mr. Scott:

Q. 1. Please state your name, age, residence and occupation.

A. George M. Ludlow; 47 years; Evanston, Illinois; I am president of the Moneyweight Scale Company.

Q. 2. Are you familiar with the circumstances which led to the purchase by the Computing Scale Company of the patents involved in this suit?

A. I am.

Q. 3. Will you please give some account of the matter referred to?

A. Prior to the formation of the Moneyweight Scale Company my brother and myself handled the scales of the Computing Scale Company, of Dayton, Ohio. Part of the territory controlled by us was the New England States, my brother representing us, with headquaretrs in Boston. He there was in competition with a scale known as the "Smith scale," and the competition was of such a nature that it was

impossible for him to do a profitable business, as this scale possessed automatic features and quick reading of the scale that our scale did not possess. While we manufactured a spring scale that was automatic, the peculiar form of the drum-shaped scale appealed to the merchants in that section. My brother urged the Computing Scale Company to purchase the Smith scale, and after some lengthy negotiations the Smith patents were acquired shortly after the Moneyweight Scale Company was formed in 1899. I would say that the Moneyweight Scale Company is a company made up of some of the district managers who formerly sold scales in specified territories. My brother and myself were among the organizers of that company.

Q. 4. Prior to learning of the Smith scale, had you any knowledge of any scale being upon the market as a commercial product having a cylinder automatically revolved by the weight of the object being weighed, and having the weights and computed values marked upon the cylinder?

Objected to as immaterial and irrelevant.

A. There was no such scale upon the market as a commercial success, and, although I have had an opportunity of seeing all types of scales manufactured and marketed, I have never seen or heard of anything prior to the Smith patents that could be used, or which there was an attempt made to market.

Q. 5. Do you know whether a substantial consideration was paid by the Computing Scale Company, the complainant in this case?

A. There was, I think the amount was $15,000, and in addition to that Mr. Smith was to manufacture a certain number of these scales at a given price.

Q. 6. Was the price you have referred to arranged for the purpose of forming an additional consideration to Mr. Smith?

A. It was.

Q. 7. Has Mr. Smith or the company through which he operated continued to manufacture scales under the arrangement you have referred to?

A. He has.

Q. 8. Up to the present time?

A. Well, there may have been some modifications, it was first a very simple form of scale.

Q. 9. I invite your attention to a scale which is before you, and would like to have you compare it with the Smith

scale which you met in competition before the purchase of the Smith patents by the Computing Scale Company.

Objected to as immaterial and irrelevant.

A. The general form of the scale is the same, but at that time it did not have the air checks or tubes at the sides of the scale for stopping the oscillation; neither did it have the thermostat for controlling the expansion and contraction of the springs caused by variations in temperature. In other respects the scale is similar.

The scale referred to in the last preceding question and answer is introduced in evidence and designated "Complainant's Exhibit Cylinder Scale."

Same objection.

Counsel for complainant produces an assignment from the E. C. Smith Company to the Boston Computing Scale Company conveying, among other things, reissue patent 11,536 and original patent 597,300, the same being the patents here in suit, and requests the notary to mark the same for identification "Original Assignment B." A copy of said assignment is introduced as "Complainant's Exhibit Copy of Original Assignment B."

No objection is made to the introduction of the aforesaid copy to have the same force and effect as the original would have if so introduced, conditioned upon the production of the original at any time during the progress of the suit upon request; but objection is here made to the document in question and to the copy thereof, as of themselves incompetent and insufficient to prove the execution, delivery or authenticity of the document.

Cross-Examination by Mr. Davis, Without Waiving Any of the Objections Heretofore Noted.

XQ. 10. What is the date approximately when you first saw any such scale upon the market as the one you designated in your direct testimony the "Smith scale"?

A. I should say the first one I saw personally, as near as I can remember, was in the year 1898.

XQ. 11. Prior to that time had you seen scales of any kind, whether automatic or not, in the sense you have used that term, that employed weight or value-indicating means comprising a drum or cylinder?

A. Yes. We manufactured scales using a drum or cylinder. The drum was turned by hand to the price per pound,

and the cylinder was of too heavy construction to operate automatically.

XQ. 12. What sort of a scale was this that your company manufactured?

A. It was a scale in which the values were arranged very similar to that used by Smith. The cylinder was a heavier construction, and had a case over it and an opening in front through which the operator could read the values. This inside cylinder was turned by a knob, and the prices per pound were arranged on the end of the cylinder. The knob would turn the cylinder to the price per pound required, and then as the poise which balanced the scale was moved, it would move to the value of the commodity.

XQ. 13. How did the user of the scale determine what weight indications and what value indications to read under any certain weight of a commodity?

A. The commodity was placed on the platform and a poise was moved out on a beam, the same as with any beam scale. Where the poise stopped, a little indicator on the poise pointed to the proper computation, and thereby showed the value of the commodity as well as the weight; the weight, however, was shown on the beam.

XQ. 14. Is this the only scale that you are familiar with, prior to your seeing the Smith scale, that employed a drum or cylinder for weight or value indications?

A. No, there was a little candy scale which operated somewhat on the same order; a few of them were put out from fifteen to twenty years ago. They did not seem to be a commercial success and died out. Along about this time there was also a scale made by the Sutton & McGrew Company, of St. Louis, who manufactured a scale something similar to ours, but it did not have the cover over the cylinder. I can't tell whether this was prior to or just about the time that I first saw the Smith scale, but it was about that time. The scale was made in St. Louis, and a number of them were sold there.

XQ. 15. Do you remember the name under which the candy scale which you refer to was marketed, or the name of the concern that marketed it?

A. No, I don't remember just what the name of that scale was, nor do I remember the name of the concern; but to the best of my recollection they had gone out of the business before I went into it, and we traded a few of them out when selling our scales.

XQ. 16. Do you remember where that candy scale was manufactured?

A. I do not. I think somewhere in Pennsylvania, but I have never known where it was manufactured.

XQ. 17. Was the agreement you spoke of with reference to the Smith patents and the carrying on of business in Smith scales, in writing?

A. I can't tell that. I haven't seen the document. I imagine it was. That was handled by the factory at Dayton. My information comes through the reference to that agreement with Mr. Smith during our Board meetings, after I became a director of the Computing Scale Company.

By Mr. Davis: In view of the above testimony of the witness, his testimony on direct as to the terms of the aforesaid agreement is objected to as secondary in character.

Cross-examination closed.

Redirect Examination by Mr. Scott.

RDQ. 18. Will you state how the cylinder was rotated in the candy scale and in the Sutton & McGrew scale, to which you referred on cross-examination?

A. By means of a little knob in the cylinder turned by hand.

Deposition closed. GEORGE M. LUDLOW.

I, Annie C. Courtenay, a Notary Public in and for the County of Cook, in the State of Illinois, and Special Examiner by agreement, hereby certify that all the proceedings aforesaid were had as stated in the cause named in the caption hereto; that on the 11th day of September, 1911, I was attended by Mr. Walter A. Scott, counsel for complainant, and Mr. Frank P. Davis, counsel for defendant, and by the witness, Mr. George M. Ludlow; that before giving his deposition the said witness was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause; and that his deposition was taken down by me in typewriting from his statements and afterwards read over and subscribed by him as and for his deposition in said cause; and that I am not related to or of counsel for either of said parties, or in any way interested in the result of said suit.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 18th day of September, A. D. 1911.

ANNIE C. COURTENAY,

(Seal.) *Notary Public.*

(End of complainant's prima facie testimony.)

CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *Complainant,*
vs.
Toledo Computing Scale Company, *Defendant.*
In Equity. No. 30,024.

NOTICE.

We hereby notify you that we shall proceed with proofs on behalf of the defendant in the above entitled cause, beginning Tuesday, December 19, 1911, at Dayton, Ohio, before Pearl N. Sigler, a Notary Public for the County of Montgomery and State of Ohio. The introduction of proofs will be proceeded with under this notice under the 67th Rule in Equity as amended and in accordance with stipulations heretofore entered into between counsel for the respective parties to the above cause, at the office of said Pearl N. Sigler in the Reibold Building, Dayton, Ohio. Witnesses to be examined are Roy S. Chaffee, John Q. Salisbury, Samuel E. Holland, and Grant Russell, all residing at Dayton, Ohio.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Defendant's Solicitors.

Chicago, December 14, 1911.

To Messrs. Sheridan, Wilkinson, Scott & Richmond, Marquette Bldg., Chicago.

Service of the above notice acknowledged this 14th day of December, 1911.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Complainant's Solicitors.

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *Complainant,*
vs.
Toledo Computing Scale Company, *Defendant.*
} In Equity. No. 30,024.

Testimony taken on behalf of defendant in the above entitled case pursuant to the annexed notice of defendant in the office of Pearl N. Sigler, 720 Reibold Building, County of Montgomery and State of Ohio, beginning 2 P. M., December 19th, A. D. 1911.

Present

Walter A. Scott, for complainant, and
F. P. Davis, for defendant.

SAMUEL E. HOLLAND, witness called in behalf of defendant, being first duly sworn, testifies as follows, in answer to questions put by Mr. F. P. Davis:

Q. 1. Please state your name, age, your residence, and your occupation.
A. Samuel E. Holland; aged 68; 523 Stillwater avenue, Dayton, Ohio.
Q. 2. Now your occupation.
A. Assembler.
Q. 3. Where are you assembling at the present time?
A. Ohmer Fare Register Company.
Q. 4. How long have you worked for that company?
A. Ten years.
Q. 5. Where were you employed before you went to work for the Ohmer Fare Register Company?
A. Dayton Computing Scale Company.
Q. 6. How long had you worked for the Computing Scale Company?
A. Ten years and about three months.

Q. 7. Where was the company located at that time,—that is, at the time when you went to work for it?

A. Callahan Power Block.

Q. 8. Do you remember what part of the building the Computing Scale Company occupied when you first went to work for it?

A. First floor, and, I think, the fourth floor, they occupied at that time.

Q. 9. What kind of work did you do when you first were employed by the Computing Scale Company?

A. Well, I did a little of everything; filing levers and sealing levers, etc.

Q. 10. Did you continue to do this same character of work during all the time you were employed by the Computing Scale Company?

A. I did not.

Q. 11. How long a time were you at this miscellaneous work?

A. I think about six or eight months.

Q. 12. What did you then do?

A. Went to sealing scales.

Q. 13. In order that the court may understand what that term means, will you please explain what sealing is?

A. Adjusting—final adjustment of the scale so that it weighs right.

Q. 14. Do you remember what sort of scales were being manufactured when you first went to work for the Computing Scale Company?

A. Well, it was what they called the Standard counter.

Q. 15. And what sort of scale was it that you first sealed after you became sealer?

A. Standard counter.

Q. 16. Was this a computing scale, and if so, what was the general scheme of its computing action?

A. Well, a combination of levers and beams.

Q. 17. What other kinds of computing scales, if any, did you seal during your employment by the Computing Scale Company?

A. A cylinder and even-balanced scale.

Q. 18. Do you recollect about how soon after you became sealer of scales you were called upon to seal or adjust any cylinder scale?

A. I don't recollect the time.

Q. 19. Do you remember whether at the time you first sealed cylinder scales, the quarters occupied by the Computing

Scale Company in the Callahan Power Block were the same as those it occupied when you first went to work for the company?

A. It was the same floor, fourth floor.

Q. 20. Where was your sealing department or shop located?

A. Southwest corner of the room.

Q. 21. On what floor?

A. Fourth floor.

Q. 22. Was the company still occupying the first floor at that time also?

A. I think not.

Q. 23. When the company vacated the first floor, to what floor did it move—that is, to what floor was the equipment of the first floor moved?

A. I don't remember now.

Q. 24. Do you remember what concern succeeded the Computing Scale Company on the first floor of that building?

A. It was the Thresher Electric Company.

Q. 25. Had your sealing department been on the fourth floor of the building while the Computing Scale Company was still using the first floor?

A. No, I believe not; they did painting up there and occupied the floor—

Q. 26. Had you done any work on any cylinder scale before you became the sealer of assembled scales?

A. I had not.

Q. 27. Will you state briefly the general character of the first form of cylinder computing scale that you had anything to do with while employed by the Computing Scale Company?

A. Well, it was a scale with a metal base and the cylinder was set on that, and then there were two beams and a plate for the scoop.

Q. 28. How was the weighing done on that scale?

A. Weighing was done by placing the article to be weighed on the plate and then moving the poise weight till it balanced the indicator on the poise weight, that indicated the price on the cylinder.

Q. 29. How was the cylinder used to arrive at different computations?

A. At one end there was price per pound, and it was turned by hand to the price per pound, then moved the poise, till it balanced, indicating the value.

Q. 30. By what means was the cylinder turned by hand—that is, what did they use to turn it?

A. I think a knob at the end.

Q. 31. Do you remember in what manner the cylinder itself was constructed in that first scale you had anything to do with at the factory of the Computing Scale Company?

A. It was a cylinder of heavy paper covered with graduated paper, and at each end there was a metal disk that held it in place on a rod.

Q. 32. Was the whole structure arranged to rotate—that is, the paper and the disk and the rod you have mentioned?

A. I have forgotten exactly how it was constructed in that respect, but I think the rod and knob was screwed into it, so that if you turned the knob you would turn the cylinder.

Q. 33. Please examine the scale that is here and then state how this scale here compares with the first construction of cylinder computing scale that you had anything to do with?

A. (Examining exhibit scale.) That is the same.

Q. 34. Will you remove the knob and the cap and examine the cylinder and state how the construction of this cylinder compares with that of the cylinder in the first scale of this character that you had anything to do with in the factory of the Computing Scale Company?

A. (Examining and removing parts.) It is the same.

Q. 35. Have you any knowledge as to how this type of cylinder scale originated in the factory of the Computing Scale Company—that is, who got it up?

A. No, I have none.

Q. 36. Do you remember by what particular name or designation it was known in the factory at the time when you were familiar with it?

A. I think they called that a grocer's scale.

Q. 37. What were the circumstances of your first knowing of this scale—that is, how did you come to know it?

A. When they were brought up in the sealing room.

Q. 38. Do you remember whether the first time you knew anything about such a scale, a single one was brought up to be sealed, or several?

A. I don't remember.

Q. 39. In the course of your experience as sealer of the Computing Scale Company of Dayton, how many such scales did you seal? You may for the present merely state generally whether it was a few or a great many.

A. A great many.

Q. 40. After sealing the first of these scales, did similar scales come along in regular course for sealing?

A. I don't remember.

Q. 41. Do you remember how such scales compared in number with scales of other kinds that you were called upon to seal during, say, the first two or three years of your serving as sealer in the factory of the Computing Scale Company?

A. I sealed more of the Standard counter scales.

Q. 42. Did all of the computing cylinder scales of the type you have described have this same construction, or cylinder that you have mentioned as a cylinder made up of a shell of layers of papers and metal end disks and supporting rod and knob?

A. I believe they did.

Q. 43. After sealing the first scale of this sort, for how long a period of time did similar scales continue to pass through your department?

A. I can't recall that.

Q. 44. Can you state approximately the period of time—that is, whether it was merely a matter of a few months or years that the manufacture of scales of this sort continued?

A. I think it was several years.

Q. 45. After the Computing Scale Company vacated the first floor of the Callahan Power Block, how much of the building did it then take possession of?

A. They were using three floors, I think, when I left there.

Q. 46. Before the company moved from the first floor had it been using only a part of the fourth floor?

A. Well, somebody had some barrels stored back there and occupied space about 20 feet square.

Q. 47. Do you mean on the fourth floor?

A. Fourth floor? No, I thought you said the first floor. They occupied all of the fourth floor.

Q. 48. Do you mean, then, that before moving from the first floor the company occupied all of the fourth floor and all of first floor, except the space occupied by the barrels?

A. Yes, and they occupied half of the basement.

Q. 49. When you first took the job of sealing, were there not others officiating in that capacity also?

A. There was.

Q. 50. Who were they?

A. William Sanderson and William Tillbury.

Q. 51. Are they living now?

A. They are both dead.

Q. 52. Did the three of you continue to be the only sealers for some time after you became a sealer?

A. No; Sanderson was called down stairs and put on some other kind of work—a job down stairs.

Q. 53. Did some one succeed you, or did you succeed some one else?

A. I succeeded Sanderson.

Q. 54. Then you and Sanderson were not sealing at the same time?

A. No.

Q. 55. How about Tillbury—were you and he sealers at the same time?

A. Tillbury and I were.

Q. 56. And you and he continued to be the only sealers for some time after you succeeded Sanderson?

A. It wasn't long till they put others on—I don't remember how soon—they ran the number up to six, I think.

Q. 57. But you remained in the sealing department operating as a sealer up to the time you left, did you not?

A. I did.

Q. 58. Can you state in what year it was that you became a regular sealer?

A. 19—no, 1892, I think.

Q. 59. And in what year was it that you first began to seal this cylinder scale, such as you have described?

A. I think it was in 1893.

Q. 60. And you continued to seal such sales during a number of years thereafter, did you not?

A. Yes, sir, I did.

By Mr. Davis: The scale here present, to which the witness has referred, is offered in evidence, and the Notary requested to mark the same for identification "Defendant's Exhibit Dayton Cylinder Scale," this exhibit to be further identified in connection with the depositions of other witnesses.

Direct examination closed.

Cross-Examination by Mr. Scott.

XQ. 61. Mr. Holland, I have removed the cylinder from the exhibit scale (removing cylinder from exhibit scale) as you did a few moments ago, and ask you whether you can weigh this scale without the cylinder being in place?

Mr. Davis: Objection; immaterial.

A. You can weigh pounds and ounces.

XQ. 62. When an object is weighed upon the exhibit scale, the operation of weighing does not cause the cylinder to move or perform any useful effect, does it?

Mr. Davis: Same objection.

A. It does not.

XQ. 63. The only movement which the cylinder has in the exhibit scale is such movement as is given to it by applying the hand to the knob at the end, is it not?

Mr. Davis: Same objection.

A. Yes, sir.

XQ. 64. How are the end pieces of this cylinder constructed, and of what are they made?

A. Cast iron (examining scale), I guess.

XQ. 65. The knob also appears to be of cast iron, does it not?

A. Yes, sir.

XQ. 66. Does the accuracy or usefulness of this exhibit scale in any way depend upon the weight of the cylinder and its knob?

A. It does not.

XQ. 67. The scale would operate just as well, would it not, if the cylinder and its knob weighed forty pounds?

A. Yes, sir.

XQ. 68. Do you find any pound and ounce marks upon the cylinder (showing scale)?

A. No.

XQ. 69. What other kinds of scales did you have experience with while in the employ of the Computing Scale Company other than the ones you have mentioned on direct examination?

A. Well, they had a—I can't describe it—a kind of a butcher's scale they called it, I think, it was a beam run out with a knob that turned the poise up and the counter balance weight turned out the price per pound; and then there was a small scale something the appearance of that (indicating exhibit scale). Also a beam scale was made, but I don't know what they called it.

XQ. 70. About what year did you leave the Computing Scale Company?

A. About 1901.

XQ. 71. Did you ever see a suspended scale having a cylinder—that is, one manufactured or handled by the Computing Scale Company?

A. I did.

XQ. 72. Can you give us some idea of the way this scale operated and what it was called, that is, its trade name?

A. No, I can't, I don't work on that myself; I think it was the butcher's scale.

XQ. 73. Have you any idea at all as to how it operated?

A. It operated with a spring and cylinder—I have for-

gotten exactly—a couple of ratchets pulled it, I think. I never examined it very closely.

XQ. 74. In this scale what effect did it have upon the cylinder when a weight was placed upon the scale?

A. The cylinder would revolve.

XQ. 75. Revolve automatically?

A. Yes, sir.

XQ. 76. It was not like this exhibit (indicating exhibit scale), in which the cylinder had to be turned by hand, was it?

A. No.

XQ. 77. Such scales were being handled by the Computing Scale Company before you left its employ, were they not?

A. Yes, sir.

XQ. 78. Have you seen any of these scales in which the cylinder revolves by reason of the weight of the object, since you left the employ of the Computing Scale Company?

A. I have seen them in grocery stores—market—

XQ. 79. They are very common today, are they not?

A. Yes, sir.

XQ. 80. Have you ever been in the employ of any other scale company than the Computing Scale Company?

A. I have, yes.

XQ. 81. In what others?

A. Southwark Scale Company, Philadelphia, and the Forsythe Scale Company of Youngstown, Ohio.

XQ. 82. Were you in the employ of these companies before or after you worked for the Computing Scale Company of Dayton?

A. Before.

XQ. 83. Can you give us some idea as to what kind of scales these companies manufactured?

A. Even balanced, ordinary lever scales, beam scales without cylinder, and all kinds of heavy scales—stock scales.

XQ. 84. What kind of a scale would you call this exhibit scale (indicating exhibit scale), aside from the cylinder, which you say has nothing to do with the weighing operation?

A. It is similar to the scale called a grocer's scale, about the same.

XQ. 85. It would be called a beam scale?

A. Yes, sir.

XQ. 86. There is nothing automatic about this action, is there?

A. No.

XQ. 87. Referring to that exhibit scale (pointing to exhibit), will you please state whether the price indications can

be read from opposite sides, or from only one side of the scale?

A. Only from one side (examining scale).

XQ. 88. There is no opening in the rear of the casing, is there?

A. No, sir.

SAMUEL E. HOLLAND.

ROY S. CHAFFEE, witness in behalf of defendant, being first duly sworn, testifies as follows, in answer to questions put by Mr. F. P. Davis:

Q. 1. State your name, age, residence and your occupation.

A. Roy S. Chaffee; age, 43 next birthday; residence, 215 Linwood street, Dayton, Ohio.

Q. 2. Occupation?

A. Linotype machinist at present.

Q. 3. Please state what your occupation was some twenty years ago, that is to say, in the nineties.

A. I was a machinist.

Q. 4. By what concern were you employed?

A. Previous to going to the scale shop do you mean?

Q. 5. When were you at the scale shop?

A. I went there, I think, in May, 1891, or May, 1892, but I think it was '91, if we can settle on that World's Fair date.

Q. 6. When you speak of the scale shop to what concern do you refer?

A. I refer to the Dayton Computing Scale Company.

Q. 7. On what work were you put when you first went with that concern?

A. The first work I ever did for them was filing steelyards and loops.

Q. 8. What sort of scales were these parts for?

A. They were for the Standard computing scale.

Q. 9. Can you state the general character of that scale you speak of as the "Standard Computing Scale"?

A. Well, it was a platform scale with a capacity of 100 pounds, had two beams to it, one computing beam, the other was used as a tare beam.

Q. 10. Can you state in what manner this Standard scale was used in the matter of computing?

A. By moving the carriage back and forth and set at a certain price. It was—I don't know how to word it exactly—

it would compute the price per pound of the article being sold or the total amount—I don't know exactly how to word it.

Q. 11. Having reference again to the time when you started to work for the Computing Scale Company here in Dayton, how is that related to the year of the World's Fair, to which you alluded?

A. For this reason: I started there, I think in May, 1891, I was married in November, 1892, and we had made arrangements to go to the World's Fair, but through little financial troubles we thought we had better stay at home.

Q. 12. You were employed by the Computing Scale Company at the time you were married?

A. Yes, sir, and previous to that.

Q. 13. How long did you stay at the job of filing steelyards and loops ,that is, approximately?

A. Not very long. It didn't require one man's full time for that kind of work. We were turning out such a small number of loops, only enough to last two or three weeks.

Q. 14. What sort of work did you take up next?

A. General machinist work, working on the bench, drill press, or anything that needed to be done.

Q. 15. How long did you continue in the employment of the Computing Scale Company?

A. I left them in March, 1897.

Q. 16. Were you continually in their employ from 1891 to 1897?

A. Yes, with the exception of four months.

Q. 17. What year did you leave their employment?

A. In 1897—let me correct that, it was 1898—I left there in March, 1898.

Q. 18. What other types of computing scales than the one you referred to as the "Standard" did you ever work upon when employed by the Computing Scale Company?

A. I worked on a scale they called the "Butcher's Scale," and the tea scale, and a candy scale.

Q. 19. Do you recall what type of scale it was that the Computing Scale Company first produced after the "Standard" that you have mentioned?

A. Well, it was what they called a "Grocer's" scale, of small capacity.

Q. 20. What was the general arrangement of that grocer's scale?

A. Double beam, with a scoop attached and a cylinder to it, probably 14 or 16 inches long, probably 4¼ to 5 inches in diameter.

Q. 21. Do you recall how that cylinder was made up, what its construction was?

A. It was made up of sheet brass with cast iron ends and there was a reel inside with a computing device on it, and a knob on the end to set it—

Q. 22. How soon after the time you worked upon the Standard scale did you become familiar with this grocer's scale with the computing cylinder?

A. Well, the way I became familiar with it I was working under Mr. Ozias' instructions; I think I did the first work on that scale that was done in the shop under his instructions.

Q. 23. Can you state about how soon it was after you first went to work that you received these instructions from Mr. Ozias, regarding making the grocer's scale with a computing cylinder?

A. Well, I can't give you the exact date on that, but it was within some time of the first eighteen months I was there—it might have been sooner than that.

Q. 24. What further was done regarding the development of the scale of this cylinder type, than the work you did on the first one having the brass cylinder?

A. I didn't catch that.

Question repeated.

A. They made a butter scale out of it and a butcher's scale and a tea scale, but the capacity of the different scales wasn't as much as the grocer's scale. The capacity of the butcher's scale was the same as the grocer's with the exception of a marble slab instead of a scoop—not marble, but porcelain.

Q. 25. Where was the Computing Scale Company located at the time you went to work for it?

A. In a building known as the Callahan Power Building.

Q. 26. What portion of that building did it occupy?

A. At that time we occupied the first floor, the basement and one of the top floors, but I am not sure just which one it was, the nickel-plating deaprtment was in it.

Q. 27. Did the Computing Scale Company remain in these same quarters when you were there, or were there any removals?

A. There were removals about two years later to the third floor and the fourth floor.

Q. 28. Do you recall whether the instructions you received from Mr. Ozias and the work you did on the first grocer's scale with the computing cylinder, occurred prior to or after the removal from the first floor?

A. It was down on the first floor, because Mr. Ozias' office

wasn't over 40 feet from where I worked, and he ran out very often to see how I was getting along.

Q. 29. Do you know what became of this first grocer's scale with the computing cylinder, that you did this work upon?

A. I do not.

Q. 30. Were any other material employed for the cylinders of like scales, that is, scales of this grocer's type—other materials than those you have mentioned, following the building of this first scale by you?

A. Not while the scale was being built, I am pretty sure there wasn't.

Q. 31. Were scales of similar character built by the Computing Scale Company, or in its shop, after it had removed from the first floor of the Callahan Building?

A. Well, that I can't say, because after we moved up stairs, a year or so afterwards, I was put to filing levers, and that took that part of the work away from me, consequently I did not pay much attention to it.

Q. 32. What sort of work were you engaged upon during this year or so of time intervening between the building of the first scale and your being put on the filing of levers?

A. I did a little of everything, with the exception of sealing. I worked on tare beams, I helped Captain Shalters, foreman of the beam department, and I mounted scales, did machinery work—anything that might be needed to be done that they put me on.

Q. 33. Did any of this work pertain to scales employing cylinders?

A. Some of them did, no doubt.

Q. 34. I invite your attention to the scale that has been introduced in evidence as "Defendant's Exhibit Dayton Cylinder Scale," and will ask you when you first saw a scale like this (showing scale)?

A. (Examining scale.) When I first saw a scale like that it was one I built, or partly built.

Q. 35. Do you refer to the one which you built under Mr. Ozias' instructions?

A. Yes, sir.

Q. 36. How does the cylinder that forms part of this exhibit scale (indicating scale) compare in make-up with the cylinder that you constructed for that first scale built under Mr. Ozias' instructions?

A. As near as I can remember, this is practically about the same thing. I drilled these reels, cut off the rods in the ma-

chine, turned these thumb-screws up, did all that work, and put them together. This practically looks like the same thing (examining Defendant's Exhibit Scale).

Q. 37. Do you mean that in the course of your employment you were in the habit of working on such parts as you have named, and assembling them into a completed cylinder?

A. Yes, sir.

Q. 38. You refer to the making of the first cylinder out of brass, or some parts of it out of brass—what parts were made out of brass?

A. I referred to the outside cover.

Q. 39. Do you mean the enclosing casing mounted on the base?

A. Yes, sir.

Q. 40. How about the cylinder itself of that first scale, what materials were used to make it, that is, the rotating cylinder?

A. I think it consisted of cast iron, with a Bessemer steel rod run through it, with a brass knob on the end, to turn it.

Q. 41. How about the shell portion, that is, the surrounding part carrying the figures, what materials were used for that in the first scale?

A. That I can't say, because it being paper, I didn't pay much attention to it.

Q. 42. It was made of paper, was it not.

A. I am pretty sure it was.

Q. 43. In this respect, then, it resembled the cylinder you have in your hand (indicating Defendant's Exhibit), the same being part of the exhibit scale?

A. It did, yes, sir.

Q. 44. And was this the case with other cylinders that you subsequently worked upon, to which you have referred?

A. Yes, sir.

Q. 45. Do you know how soon it was after the completion of that first scale under Mr. Ozias' instructions that you assembled or worked upon other cylinders for this type of scale?

A. Well, I worked on a small scale they called a "Candy" scale, and also one they called a "Postal" scale, but I can't remember whether that was done down stairs—if it wasn't it was done shortly after we went up stairs, but it strikes me we made a few down stairs.

Q. 46. And these scales you have just referred to all had the cylinder as part of their construction, did they not?

A. Yes, only they were different sizes, the cylinder of the two scales that I referred to, one was a large cylinder and the

other a small cylinder of 2½ inches diameter and 8 inches long, something like that.

Q. 47. Did the Computing Scale Company continue from then on regularly to manufacture for the market scales of this type under varying sizes?

A. Yes, sir.

Q. 48. Did this continue up to the time you left the employment of that company?

A. They were still making a few of the old-style grocer's, as we called it, but very few; of the candy scale they were making quite a few then.

Q. 49. And in the manufacture of this type of scale to which you refer as the "Old Grocer's type," during the years of your employment by that company, was the cylinder construction comprising the end disks and central rod and the paper shell ever departed from?

A. Not to my recollection.

Q. 50. This, then, was the regular or standard mode of construction that was followed for the cylinder of these scales during these years?

A. As far as cylinders were concerned, as near as I can remember.

Q. 51. Was this type of scale, that is, the old grocer's type —known around the factory by any other designation that you know of, or called by the name of any person who was connected with its origin?

A. That I cannot say, unless we simply called it the small "Grocer's Scale." Of course, as a "butter scale" we would know what they meant; we would know what they meant by the "Tea Scale," and in order to designate it from the other scale, the larger one, we would have to call it the "Small Grocer's Scale." Whether that was the correct name the firm gave it I don't know.

Q. 52. Were you familiar during your employment by the Computing Scale Company with system of serially numbering or otherwise numbering its product?

A. No, I was not. I think the sealers did that. About the last thing they did was to put on a name-plate and number the scale.

Cross-Examination by Mr. Scott.

XQ. 53. In this Defendant's Exhibit Dayton Cylinder Scale, the cylinder is turned by hand, is it not?

A. Yes, sir.

XQ. 54. While you were employed by the Computing Scale Company did you see any scales in which the cylinder was turned automatically by placing the goods upon the platform or pan?

A. I think not.

XQ. 55. Are you familiar with such scales now?

A. I have seen them around the grocery stores; I am not familiar with them. They worked on an automatic cylinder quite a number of times while I was there, but whether they were putting them on the market or not I can't say; I think not.

XQ. 56. I presume from the fact that you were in the scale business at the time you sepak of you have since been more or less interested in noticing scales?

A. I have, but not very closely; just a casual glance.

XQ. 57. At the present time have you noticed many of the scales such as the Defendant's Exhibit Dayton Cylinder Scale?

A. No, sir; I don't know of any that is in use.

XQ. 58. Have you noticed in use at the present time many of the scales with a cylinder which is automatically turned by the goods upon the platform?

A. I have seen a few recently.

XQ. 59. In what sort of business places were they used?

A. Well, I have seen them in butcher shops; I recall looking at one over at the Arcade not long ago, and I have seen them around in different groceries.

XQ. 60. You see them in a great many such stores, do you not?

A. Yes.

XQ. 61. Probably saw more of them than any other single type of scale?

A. I can't say as to that, because my grocer has a Toledo scale and I see that quite often.

XQ. 62. This Toledo scale to which you refer has an automatic drum, has it not?

A. This one I refer to has not; no.

XQ. 63. It has a fan-shaped chart, has it not?

A. They call it a "Springless Scale," I believe.

XQ. 64. Judging by your general observation you would say, would you not, that scales with automatically revolving drums are very common?

A. Well, yes, there are a great many of them; but there are a good many of other kinds; it is hard to find a grocer's or butcher's scale that doesn't have a computing device.

XQ. 65. These computing scales that grocers and retailers have are almost universally of the automatic computing kind, are they not?

A. Apparently seem so.

XQ. 66. What was the first automatically computing scale which you ever saw?

A. Well, I can't say as I saw them work on an automatically computing scale, but it was given up several times. Mr. Sanderson told me time and again it never could be accomplished, but they finally did.

XQ. 67. That is, the Computing Scale Company made several unsuccessful efforts before they succeeded with it?

A. Yes, sir.

XQ. 68. Do you have any recollection as to what the difficulty was that caused them to fail in their early efforts?

A. They were using a spring.

XQ. 69. Do they still use springs?

A. I can't say.

XQ. 70. You haven't observed the inside structure?

A. I haven't observed; I have never been in position to do that.

XQ. 71. But you have a distinct recollection that several unsuccessful attempts were made by the Computing Scale Company before they finally succeeded in manufacturing a successful automatically computing scale?

A. Yes, sir, I have; I was told so by Mr. Sanderson. I was then working on this at the factory and the ones they were working at were brought to success.

XQ. 72. Who was this Mr. Sanderson you speak of?

A. He was a gentleman that was brought here from the East; was considered an expert scale maker.

XQ. 73. He had had extensive experience in scale making?

A. I understood he had.

XQ. 74. What was his position in the Computing Scale Company?

A. When I went there he was superintendent.

XQ. 75. Do you know what has been his business experience?

A. He has been superintendent at the Dayton concern and was there for quite a while, then he went to Cleveland to work, and through Mr. Sanderson I went to Cleveland, and then he came back here and if I remember he has worked in two or three places since he first began with this company.

XQ. 76. Did you understand he was in the scale business before he came to the Dayton Computing Scale Company?

A. I always heard of him being with the Fairbanks and the Howe people.

XQ. 77. What was his business in Cleveland?

A. He was connected with—I can't recall the name of that firm now—well, a computing scale company.

XQ. 78. Was it The National Computing Scale Company?

A. Yes, sir.

ROY S. CHAFFEE.

JOHN Q. SALISBURY, witness in behalf of defendant, being first duly sworn, testifies as follows in answer to questions put by Mr. F. P. Davis:

Q. 1. Will you please state your name, age, residence and occupation?

A. John Q. Salisbury; 36 pears old; 107 Marathon Avenue, Riverdale; foreman, National Cash Register Company, Dayton, Ohio.

Q. 2. How long have you been employed by The National Cash Register Company?

A. Since 1894.

Q. 3. And where were you employed prior to that time?

A. Dayton Computing Scale Company, and about a week in between that I worked for Shawan & Thresher.

Q. 4. When did you go to work for the Computing Scale Company at Dayton?

A. About 1890.

Q. 5. And how long did you continue in their employment from that time?

A. Up until about the middle part of 1893.

Q. 6. What was the nature of your work during that period?

A. Foreman, with the exception of about three months,—I was assembling the first three months.

Q. 7. What kind of scales was the Computing Scale Company manufacturing during this period of time when you were foreman?

A. The main seller at that time was known as the "Grocer's" scale at that time. It had a dial, was computed off of a dial instead of off the beams as it is now. We also manufactured what we termed a "Butter Scale," which consisted of about three beams and computed off the beam. Also a butter-fly scale that was in the shape of a "V" and computed off of the poise in this shape (indicating shape with hands). We also manufactured a cylinder scale. That scale was computed about the same as the butter-fly scale, with the exception that you had to revolve the cylinder.

Q. 8. Please look at Defendant's Exhibit Dayton Cylinder Scale (showing exhibit scale) and state how it compares in construction to what you last described and which was made during the period you were foreman?

A. (Examining scale.) May I ask a question? Is this glass (indicating glass in cylinder of Defendant's Exhibit Scale) magnifying glass?

Q. 9. No.

A. This is among the first to my recollection of the cylinder scale. I draw my conclusions of that by the first scale we built, as we had a regular common window pane in there. Along about six months afterward we had a magnifying glass put in to magnify the characters on the computing cylinder.

Q. 10. About when was it that you first knew of a scale like this exhibit scale?

A. About the year?

Q. 11. Yes.

A. 1890 to 1891.

Q. 12. What shape was the scale in when you first knew anything about it?

A. Experimental stages.

Q. 13. Who was working on it at that time?

A. Men by the name of Killburn and Tillbury and had some instructions from then General Manager Mr. Ozias.

Q. 14. Where was the factory of the Computing Scale Company located at that time?

A. Back of the Home Mutual Savings Association, what was known as the "Callahan Building."

Q. 15. What part of the Callahan Building did it occupy?

A. The first floor.

Q. 16. Was this experimental work going on on the first floor?

A. Yes, sir, in the corner right back of the office.

Q. 17. About how long did this experimental work go on before there was a perfected scale produced?

A. I judge several months.

Q. 18. Do you remember whether the manufacture of scales of this sort was gone ahead with right away after the completion of this first experimental scale?

A. I am reasonably sure that one or more was placed on the market but was returned on account of the dimness of the characters. That is why we changed and put magnifying glass on it.

Q. 19. During the time that you were foreman in the factory of The Computing Scale Company were scales like this

Exhibit Scale (indicating scale) coming through regularly as one of the products of the company?

A. At that time it was known more as a side issue; we were not sure of it; yet they were sold.

Q. 20. Please examine the cylinder that is part of this Exhibit Scale (indicating Defendant's Exhibit Scale) and state whether the construction of the cylinder in scales of this type that were being sold during the time mentioned corresponded with this cylinder in make-up.

A. (Examining Defendant's Exhibit Scale Cylinder.) As I remember it, the characters that are on the outside doing the computing were on printed paper and glued to a cylinder. Whether this is glued on I don't know. It is similar in construction—practically the same thing.

Q. 21. Do you remember what material was employed in the cylinders of those scales during that period to paste the printed paper on?

A. No, I don't. It was some kind of mucilage; I don't know just what it was.

Q. 22. I intended to inquire as to the material of what the paper was laid over and pasted to; that is, the material used for the cylinder.

A. It was glued to pasteboard.

Q. 23. About what time of year was it that you left the employ of the Dayton Computing Scale Company?

A. That was in the early—no, latter part of 1893.

Q. 24. And where did you go then?

A. Beaver Falls Computing Scale Company.

Q. 25. Did you continue to keep posted as to computing scales that were on the market, including those sold by The Computing Scale Company of Dayton?

A. Not any more than what had been brought into the factory to complete.

Q. 26. Who were associated with you or in charge of the enterprise at Beaver Falls?

A. Mr. Culmer was at the head of the company and Mr. Milburn, who was known as superintendent.

Q. 27. Did the subject of computing scales employing cylinders come into consideration at the time when you joined these people at Beaver Falls?

A. I didn't catch that.

((Question repeated by stenographer.)

A. Yes, sir; we manufactured one, a spring scale.

Q. 28. Did you have there at Beaver Falls one of thees cylinder scales such as the exhibit in this case?

A. Not to my recollection.

Q. 29. How soon after your going to Beaver Falls was this cylinder scale you speak of built?

A. The cylinder scale was built on the order of a spring scale, had a small cylinder attached to the end standing upright. That was before I came.

Q. 30. What material was used in the construction of that scale, do you remember?

A. Pasteboard, cast iron and wrought iron rod with knob attached. It turned practically the same as that (indicating Defendant's Exhibit Scale) only the cylinder stood upright.

Q. 31. By what name was the scale known in the Dayton factory; that is, the scale like this Exhibit Scale here (indicating scale)?

A. If I remember right, it was the butter scale or meat scale.

Q. 32. Was it called by the name of any individual who was connected with its origin?

A. Not to my knowledge.

Q. 33. After you had left The Computing Scale Company the latter part of 1893, how long did you continue in the scale business?

A. Shortly after that I went to work for the National Cash Register Company.

Q. 34. About how soon was that after you had gone to Beaver Falls?

A. After I came from Beaver Falls?

Q. 35. No, after you went there.

A. About a year and a half after I went there.

Q. 36. During that year and a half had you seen any used or on sale of these cylinder scales like the exhibit manufactured by The Computing Scale Company?

A. I can't say that I did.

Q. 37. During the time that you were employed by The Computing Scale Company at Dayton was the construction of cylinder as to material the same in all scales turned out like the Exhibit Scale, or were there variations?

A. There were variations. There were improvements made on them afterwards. If I remember right we used a cylinder—a celluloid cylinder at one time.

Q. 38. Do you mean that during the time you were foreman there some of these scales were manufactured and put upon the market with celluloid in place of the paper or pasteboard?

A. I mean to say that they were made in the factory as

far as I have seen them in use, but I can't say as to the sale of them or their being in use. I know we made quite a number of them.

Direct examination closed.

Cross-Examination by Mr. Walter A. Scott.

XQ. 39. In operating the cylinder spring scale that was made at Beaver Falls the cylinder was turned by hand, was it not?

A. Yes, sir.

XQ. 40. That is, there was a knob on the cylinder and it operated just like the Exhibit Scale before you?

A. Yes, sir.

XQ. 41. I understood from your testimony that you had no direct knowledge that any cylinder scales after the order of the scale in front of you, that were provided with celluloid cylinders were sold; is that true?

A. I have no direct knowledge.

XQ. 42. Have you been with any other scale company or companies than those mentioned, the one at Dayton and the one at Beaver Falls?

A. No, sir; I have not.

XQ. 43. Have you observed the different types of scales that have come upon the market for sale?

A. Not recently. I have given all my attention to cash register work.

Cross-examination closed.

Redirect Examination by Mr. Davis.

RDQ. 44. Were you familiar during the time of your employment by The Computing Scale Company with their system of numbering?

A. System was installed after I left. We had no system, candidly speaking. I remember some time shortly after I had taken charge I brought up the question of numbering scales, but Mr. Ozias did not feel disposed to put that price on them at that time. The scales that were built by me under my instructions had no numbers any further than the patent rights, something similar to that (indicating Defendant's Exhibit Scale).

RDQ. 45. Do you know anything about patents being applied for on this cylinder scale like this exhibit here (indicating Defendant's Exhibit Scale)?

A. Do you mean the patent?

RDQ. 46. Did you know anything about a patent being applied for?

A. Not any more than that one had gone through; that they had applied for it.

RDQ. 47. You did know that a patent was applied for?

A. Yes, sir.

RDQ. 48. Do you know in whose name it was applied for?

A. If I remember rightly it was in Miss Kepler's name.

RDQ. 49. I hand you a copy of patent No. 514,475, applied for May 19, 1893, and issued February 13, 1894, to Lutie Florence Kepler, of Dayton, Ohio, and will ask you if this is the name of the Miss Kepler to whom you just referred, "Lutie Florence Kepler" (reading name on patent copy)?

A. (Taking copy of patent and reading name.) She was known as Lutie Kepler; I judge it is the same.

RDQ. 50. Do you recognize the drawings of that patent as illustrating the type of cylinder scale that this Exhibit Machine represents?

A. I do.

By Mr. Davis: Copy of the above-mentioned Kepler patent is offered in evidence, entry clerk requested to mark the same "Defendant's Exhibit Kepler Patent."

Examination closed.

JABEA F. SHAWAN, witness called in behalf of defendant, being first duly sworn, testifies as follows in answer to questions put by Mr. F. P. Davis:

Q. 1. State your name, age, residence and your occupation.

A. Jabea F. Shawan; age, fifty years my next birthday; occupation, electrical engineer; residence, 406 Wayne Avenue, Dayton, Ohio.

Q. 2. Please review briefly your business activities during the last twenty years.

A. In '90 I left Concord, New Hampshire, and came here; did jobbing and engineering business in Dayton till '92. Then in the winter of '92, along about November and on from November till about February was still in the same business but was connected with it only in an open way. During the month of February the partnership of the Shawan & Thresher firm was organized. About the latter part of February we started manufacturing electrical goods for lighting, etc., and he and

I continued together then until December, '95, I think for three years,—it didn't run the full time. Then I went back into the jobbing business again and continued until 1901, the summer of 1901,—by myself and then quit the business and went West. Spent eight years in the West, going back and forth, then came back here and have been here the balance of the time, doing business always in the same line. I think that is all.

Q. 3. Where was the Shawan & Thresher partnership located when you first established it?

A. We were in the Bates Brothers' Building, on the corner of Fourth and St. Clair Street, when it was first organized.

Q. 4. How long did the concern remain at that location and where did it move to?

A. We began to move about two weeks after we organized. Of course we kept working down there and getting into other business at the same time.

Q. 5. Where did you move to?

A. The Callahan Power Building.

Q. 6. What quarters in the Callahan Power Building did you take up at that time?

A. First floor.

Q. 7. Were those same quarters occupied by anyone else at the time you rented them?

A. I think The Computing Scale Company had a lot of stuff there when we moved, and Canby had a lot of cans, boxes, barrels and then the hardware people had some stuff in at that same time.

Q. 8. Did your concern follow in occupancy of the first floor of the Callahan Power Building immediately upon the removal of The Computing Scale Company from those quarters?

A. Yes; there was considerable stuff they had to move out of the way when we first went in till they got at it—castings, boxes, etc., had to be moved out of the way for part of our machinery to be set up.

Q. 9. Were you familiar at the time, or did you shortly become familiar with the product that The Computing Scale Company was turning out, and if so, please state what?

A. No, we did not pay any attention to what they were making. Of course we saw a good many old scales, bought one pair of them, but I don't think I noticed anything more except the stuff they had in the office. Never went into the details of their work; had no business there.

Q. 10. Were you acquainted with any of the people who conducted the affairs of The Computing Scale Company at that time?

A. Yes; I knew Mr. Ozias, Mr. Canby and Mr. Stillwell.

Q. 11. Was there any intercourse between you and those gentlemen during the time you occupied the first floor of the Callahan Power Building?

A. Only in a casual way, passing through and in and out.

Q. 12. Did The Computing Scale Company continue to occupy the first floor after you took it?

A. No.

Q. 13. Did any of these gentlemen connected with The Computing Scale Company ever exhibit to you any of their products?

A. Mr. Ozias brought in a printed cylinder once and asked me if I could suggest any way of making them cheaper than they were then making them; that was about the only thing I remember; simply came in along the steps knowing that we did all kinds of jobbing work.

Q. 14. Do you recollect when this incident occurred? Have you reference to the time when you moved into the Callahan Building?

A. It must have been a month or more after we went there. The weather was warm; the doors and windows open at the time; it must have been along in April or May, as the weather was pleasant.

Q. 15. In what year was this?

A. In '93.

Q. 16. Just what was the article that Mr. Ozias displayed to you upon that occasion?

A. It seems to me it was one of these cylinders; when it was printed. I think he called it the price cylinder; what he had was a cylinder about that long (holding hands apart indicating length), and he wanted to know if I could suggest a way to make up the figures and in a cheaper way. We had talked over it once before—we were making a machine in Cincinnati when I was there which had a rolling cylinder with a slide around it. I told him then how we had put these figures on that machine. I think that is what tempted him to bring it to me; we had been doing quite a bit of jobbing business then.

Q. 17. Please look at the cylinder which is part of the scale that is offered in evidence, "Defendant's Exhibit Dayton Cylinder Scale" (handing witness cylinder), and state

how that compares with the article which Mr. Ozias exhibited to you upon the occasion to which you refer.

A. It was a cylinder in form like this; I think the figures were printed on with a pen; I am not certain but think that is the way they were put on, and I can't say now whether that cylinder had sides or not; it was just a plain cylinder made of pasteboard rolled up.

Q. 18. Have you any means of determining the time when Shawan & Thresher moved to the Callahan Power Building, other than your mere recollection?

A. The last bill I paid Bates Brothers for rent was in February and from that is about the only thing we can absolutely determine the time. The contracts between Thresher and myself have gotten destroyed; it has been so long they can't be found.

Q. 19. Have you investigated to see if you can find a copy of that contract?

A. Yes; I have looked all over my own papers and can't find it.

Q. 20. How about the record of your paying the last month's rent for the quarters you occupied at Fourth and St. Clair streets, have you investigated in that?

A. I saw Mr. Bates and he gave me the date of the last payment and I think if we had the books we could establish absolute fact of payment.

Q. 21. Do you remember who collected the rents of the Callahan Power Building?

A. I think Judge Dustin did, that is, lawyer Dustin he was called then; he became judge afterward. We paid him. I don't think we made payment for about three months after we moved in; our credit was good then.

Q. 22. Do you know who has possession at the present time of the books of the Callahan estate that would contain a record of rent at that period?

A. No, I do not.

Examination closed.

RUSSELL H. BATES, witness in behalf of defendant, being first duly sworn, testifies as follows in answer to questions put by Mr. F. P. Davis:

Q. 1. State your name, age, residence and occupation.

A. Manufacturing business.

Q. 2. What is your age?
A. My age is 50 years.
Q. 3. Residence?
A. Dayton, Ohio.
Q. 4. Occupation?
A. Manufacturing business.
Q. 5. What is the name of your concern?
A. At that time it was D. L. Bates Brothers; now it is D. L. Bates & Company.
Q. 6. To what particular time do you refer when you say "At that time"?
A. When we were a corporation—let's see, I have forgotten the year. I can't say positively. Within the last ten years.
Q. 7. Where was your concern located in the year 1893?
A. Fourth, St. Clair and Kenton streets.
Q. 8. Did anyone else occupy any part of the premises at that time?
A. We sublet it to Mr. Shawan—subletted a portion of the fourth floor.
Q. 9. Do you refer to J. B. Shawan, who has testified in this case?
A. Yes, J. B. Shawan.
Q. 10. How long was Mr. Shawan, or anyone with whom he was connected, a tenant on your premises at Fourth and St. Clair streets?
A. I can't say exactly, but I should judge four or five months. I don't know how positive that is; I didn't refer to the books.
Q. 11. Have you anything at hand which will show when Mr. Shawan or his associate ceased to be a tenant?
A. Nothing more than a ledger of 1893.
Q. 12. What does this ledger show when Mr. Shawan ceased to be a tenant?
A. The ledger shows Mr. Shawan paid us his balance March 4th, in settlement of his account, including the February rent.
Q. 13. And you have no entries after that?
A. No entries after that date.
Q. 14. Do you recall the circumstances of Mr. Shawan moving out and do you know to what quarters he moved?
A. He moved his machinery to the Callahan Power Building and went in the Shawan-Thresher Electric Company.

Q. 15. Was this book that you have, this ledger, kept by you?

A. No, I wasn't the bookkeeper; my nephew was the bookkeeper then.

Q. 16. You are familiar with his handwriting?

A. I am thoroughly familiar with the book and his handwriting.

Q. 17. And did you at that time constantly consult this book and know of the entries made in it?

A. Yes, sir.

By Mr. Davis: The ledger produced by the witness is submitted for inspection to opposing counsel, particularly as to that portion to which the witness has referred. (Hands it to Mr. Scott, who examines it.)

Q. 18. Will you please read into the record the group of entries which you find in this book relating to the matter of rent paid by Mr. Shawan?

Book is handed to stenographer, who copies entries as follows:

January 1st,—Shawan.

1893				
	Forwarded from page 374 Ledger #2.			
Jan.	1	Balance		6.69
	5	Rent month of December	171	8.33
	9		171	.25
	11		171	.36
Feb.	1	Rent month January	177	8.33
	10		178	.40
	28	Rent month February	183	8.33
				32.69

Examination closed.

HERBERT GRANT RUSSELL, witness in behalf of defendant, being first duly sworn, testifies as follows in answer to questions put by Mr. F. P. Davis:

Q. 1. Please state your name, age, residence and occupation.

A. Herbert Grant Russell; age, 46; residence, 232 K street, Dayton, Ohio; occupation, assembler National Cash Register Company.

Q. 2. How long have you been employed by The National Cash Register Company?

A. For eleven years.

Q. 3. And where were you employed before that?

A. The Computing Scale Company, city.

Q. 4. When did you first go to work for The Computing Scale Company of Dayton?

A. This gentleman (indicating Mr. Kepler) said it was in March; I don't remember the exact month (consulting note book); March 19th, 1894 (reading from book).

Q. 5. What is the book that you just consulted before answering?

A. Book of record of changes I made while I was there for my own benefit and for the company.

Q. 6. Have you any objection to submitting that book for inspection of Mr. Scott—just let him look at it as to the character of the book?

A. No. (Hands book to Mr. Scott, who examines it.)

Q. 7. What sort of work did you first do when employed by The Computing Scale Company?

A. Shipping clerk and inspector.

Q. 8. What sort of scales was that company shipping out at that time?

A. They were shipping out a scale called the "Tea Scale," grocer scale and butcher's scale, and the "Standard" scale, they called it.

Q. 9. What was the general character of the scales you have mentioned other than the Standard; that is, what sort of scales were they?

A. I can't describe the scale; similar to that (indicating Defendant's Exhibit Scale). The different scales had marble platter and scoop and different capacities of beams.

Q. 10. These scales other than the Standard, then, were of the same kind as the Exhibit Scale, other than varying in capacity, some having scoops and others platters and platforms?

A. They also had cylinders of different denomination.

Q. 11. Do you know what series of numbers were in use at that time for designating the scales that were going out?

A. Cylinder scales were in four thousands.

Q. 12. Have you anything at hand by way of record you kept at that time showing numbers?

A. Yes, I have a book (displaying small book)—I have a book with the different numbers for the cylinder scales in it.

Q. 13. What is the first number that appears in the book?

A. Cylinder number is four thousand (4000). Understand there is no date in this book; I don't know the date. This other (indicating first book consulted) is in '96, but this cylinder number is not dated at all. I seem to have no record of anything back of '96 that I can find any date on.

Q. 14. Please examine the scale here present (indicating Defendant's Exhibit Dayton Cylinder Scale) and state what number you find upon it.

A. (Witness consulting number on cylinder.) Four thousand and forty-five (4045).

Q. 15. Is there anything else about this exhibit scale which indicates to you that it was one of the early scales of this type shipped from the factory of The Computing Scale Company?

A. Yes, I can tell by the base not being decorated that it is one of their early scales.

Q. 16. Does the character of the base indicate to you that scales like this were being shipped at the time you first went to work for The Computing Scale Company?

A. Yes, sir.

Q. 17. Please now examine the cylinder that is in this exhibit scale (Mr. Davis taking out cylinder and handing it to witness), and state how its make-up compares with that of the cylinder scales that were being shipped at the time you went to work for The Dayton Computing Scale Company?

A. I can't remember the way they were put up (examining cylinder) when I was there.

Q. 18. Were scales of this sort manufactured and shipped right along from the time you went to work for that company during several years?

A. Yes, they shipped them for a number of years until they got out a later model.

Q. 19. How long were you employed by The Computing Scale Company?

A. About five and a half years.

Q. 20. And during all of that time were scales like exhibit scale being made and shipped?

A. No, sir.

Q. 21. For about how long after your employment in March of 1894 did the company continue to make this type of scale and ship it?

A. Well, I can't tell that, only I would say about two years, but no date or anything.

Q. 22. Should you say that this continued up to the time that the later type of scale came along that you referred to before?

A. Yes, they manufactured this until the new model was out.

Q. 23. About how long before you left the employment of The Computing Scale Company was it that this new model you speak of was brought out?

A. Well, I can't tell that.

Q. 24. Would you say that it was near the time that you left?

A. No, it was several years, possibly three years before I left.

Q. 25. Did all the scales of the type of this exhibit scale that came under your notice during the time you were employed by The Computing Scale Company have this same construction of cylinder that is in the exhibit scale, that is, a cylinder made up of the end disks and the rod and the paper or pasteboard shell?

A. Yes, they were made similar to that, but later on they used spun pieces instead of cast iron—spun brass—but the construction was the same.

Q. 26. Do you know why the spun brass was adopted in place of the cast iron?

A. No, I don't; unless it was to make it lighter and stop it from rusting, probably.

Q. 27. Do you remember about how soon it was after you first went to work for The Computing Scale Company that the spun brass cylinder heads were adopted?

A. I would say about a year.

Q. 28. Referring now to the book that you produced and consulted regarding the time when you were employed, in your previous answer you said this book was dated 1896, when was the entry made of the date of your employment as March, 1894?

A. I made that when I left there. When I left there I had a recommendation and it stated on that how long I had been employed there.

Q. 29. The two entries "Went with Scale Company March 19th, 1894," "Left Scale Company August 7th, 1899," were then made in this book at the same time?

A. Yes, after I left.

Q. 30. Do you have that recommendation you speak of which refers to the date of your employment?

A. I don't know whether I have or not; I haven't it with me; may have it at home.

Q. 31. What is your best recollection as to when you used that other (the second one consulted) small book you produced and what the use was that you made of it; that is, why it contains these entries of numbers?

A. These numbers are not put on until after they were mounted and I had charge of the mounting.

Q. 32. You kept the numbers in the book, then, for reference in connection with your mounting the plates with numbers?

A. Yes; different kinds of scales took different sets of numbers and had to keep a record of them.

Q. 33. Were you doing this work during the first part of your term of employment by The Computing Scale Company?

A. No, I didn't do this until I was appointed foreman.

Q. 34. How soon was that?

A. That was probably in '96 when that book started.

Q. 35. Do you remember whether at the time you were appointed foreman the old style base that this Exhibit Scale had was still being used?

A. Yes, I think it was.

Q. 36. Had other styles of bases been brought out meantime?

A. No, I think the new base was brought out after I had charge of the work.

Q. 37. Do you mean after you became foreman?

A. Foreman; yes, sir.

Direct examination closed.

Cross-Examination by Mr. Walter A. Scott.

XQ. 38. I understand that on Defendant's Dayton Cylinder Exhibit Scale an object can be weighed without using the cylinder at all?

A. That is correct; yes, sir.

XQ. 39. And the cylinder turned by hand and not by the weight of the object weighed?

A. Yes, sir.

XQ. 40. While you were with The Computing Scale Company did you see any scales in which the cylinder was turned by the weight of the object being weighed?

A. Only in a scale with a spring balance.

XQ. 41. What kind of a scale was that; that is, a general description of it?

A. That was a cylinder scale suspended from a hook with a pan we used to weigh with, hanging below the scale.

XQ. 42. When you placed an object on the pan it rotated the cylinder?

A. Pulled down and rotated the cylinder.

XQ. 43. Have you any recollection as to about when you first saw that scale?

A. I have no record of it; I can't tell exactly, only guess.

XQ. 44. Would you estimate it as two or three years before you left their employ, or about when?

A. I would say between two and three years before I left.

XQ. 45. You didn't have anything to do with experimental work?

A. No, sir.

XQ. 46. When did you first see one of these automatic cylinder scales, that is, scales in which the weight of the object turned the cylinder so constructed as to stand upon a counter like Defendant's Dayton Cylinder Scale which is before you (indicating scale on exhibit?

A. Like that scale there; are you talking about the spring-balanced scale?

(Stenographer repeats question.)

A. I answered that I had no record; it was merely guessing at it when I said two or three years.

XQ. 47. I will ask that a little differently. I understand that the spring-balanced scale to which you have referred was a suspended or hanging scale?

A. Yes.

XQ. 48. And what I wish to know is when you first saw one of the spring scales that was constructed so as to stand upon the counter instead of hanging.

A. Well, they didn't manufacture that until after I left the factory.

XQ. 49. Did you hear anything about that when you were with The Computing Scale Company?

A. No.

By Mr. Davis: This line of examination is objected to as immaterial.

A. (Continued.) I have seen them in use, that is all I know.

XQ. 50. What was the first automatic computing scale you ever saw? By automatic I mean one in which the only

operation necessary was to place the commodity upon the scale and then to read the weight and price.

A. That goes back to the same question. I can't answer that exactly—probably in '94 some time.

XQ. 51. This one you refer to in '94 was a suspended spring balanced scale?

A. Wait; that is not right, '94, for that is when I went to work; it was about '96.

XQ. 52. Then I understand that the first suspended spring balanced scale of 1896 was the first automatic computing scale you ever saw, that is, the first one in which the only operation necessary was placing the goods on the pan and then reading the price and weight?

A. Yes, sir.

XQ. 53. Do you remember any of the trade names by which this suspended spring balanced scale was known?

A. No, we always designated it as the small spring balanced scale, it was really a butcher's scale—they called it the "Factory Spring Balanced Scale."

XQ. 54. I show you reissue patent 11,536 (showing copy of patent) and would like to have you state whether the drawings of this patent represent the spring balance to which you have just referred.

A. (Witness examining issue of patent.) Yes, it looks like the same scale.

XQ. 55. And the scale represented in the drawing of this patent is the first automatic computing scale that you ever saw, as I understand you.

A. Yes.

XQ. 56. Were you ever in the employ of any other scale manufacturing Company besides The Computing Scale Company of Dayton?

A. No, sir.

Cross-examination closed.

Note: It is stipulated and agreed between counsel for plaintiff and counsel for defendant that signatures of the witnesses Samuel E. Holland, Jabea F. Shawan, Roy Chaffee, Russell H. Bates, John Q. Salisbury and Herbert Grant Russell, to the foregoing depositions be waived.

Adjourned December 20, 1911, subject to further notice.

CERTIFICATE.

State of Ohio,
County of Montgomery, } ss.

I, Pearl N. Sigler, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified, do hereby certify that the above named Roy S. Chaffee, John Q. Salisbury, Samuel E. Holland, Grant Russell, Jabea F. Shawan and Russell H. Bates, were by me first severally sworn to testify the truth, the whole truth and nothing but the truth; that the foregoing depositions were reduced to writing by Miss Ida Pflaum in my presence and that said depositions were taken at the time and place specified in the notice hereto attached and the taking of said depositions was continued from day to day, by agreement of counsel; that the witnesses named live at a greater distance from the place of trial of the within entitled case than one hundred miles; and that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on this 13th day of January, A. D. 1912.

PEARL N. SIGLER,
(Seal) *Notary Public, Montgomery County, Ohio.*

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company
vs.
Toledo Computing Scale Company } In Equity. No. 30,024.

NOTICE.

To Messrs. Sheridan, Wilkinson, Scott & Richmond,
Marquette Bldg., Chicago, Ill.

Gentlemen:

You are hereby notified that we shall resume the taking of the depositions on behalf of defendant in the above-entitled cause, under the 67th Equity Rule as amended, and in accordance with the stipulation hereinbefore entered into between the parties to the above cause by their counsel, before Solon T. Klotz, Notary Public for Lucas County, Ohio, at the office of Messrs. Owen & Owen, 922 Nicholas Building, Toledo, Ohio, beginning at eleven o'clock in the forenoon on Friday, December 29, 1911. Witnesses to be examined are John H. Milburn, a resident of Detroit, Michigan; John H. Culmer, a resident of Cleveland, Ohio, and Clarence H. Hapgood, a resident of Toledo, Ohio. You are invited to attend.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

Chicago, December 27, 1911.

Service of above notice acknowledged this 27th day of December, 1911.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Solicitors for Complainant.

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024.

Introduction of proof resumed on behalf of defendant in the above entitled cause, pursuant to the annexed notice, before Solon T. Klotz, Esq., a Notary Public, at the offices of Owen & Owen, Nicholas Building, Toledo, Ohio, beginning at 11 o'clock A. M., December 29, 1911.

Present:

Walter A. Scott for complainant;

F. P. Davis for defendant.

JOHN W. CULMER, a witness called by defendant, having first been duly sworn, testifies as follows, in answer to questions put by Mr. Davis.

Q. 1. Please state your name, age, residence and occupation.

A. John Woodruff Culmer; sixty-seven; 2424 East Sixty-first Street, Cleveland, Ohio; mechanical engineer.

Q. 2. Please state what business you were engaged in during the early 90's, stating the years and places where you were located.

A. I was located permanently as to residence at New Brighton, Penn., from 1890 to 1896, inclusive. During that time, at all times fully one-half of my time was devoted to the scale industry. From July, '91, until August, '92, one-half of my time was given to The Computing Scale Company of Dayton. From the fall of '92 up until '95 I was engaged in preparing for and operating the Keystone Store Service Co., of Beaver Falls, Pa. From '96 or '97 up until 1903 I was with the National Computing Scale Company of Cleveland.

Q. 3. What was the nature of the services you were performing for The Computing Scale Company of Dayton in the years 1891 and 1892?

A. The perfecting of scales which they were preparing to manufacture and manufacturing, especially their counter platform beam scale, which was the only scale manufactured during that time for the market.

Q. 4. What was the work that you undertook when you engaged in business at Beaver Falls, Pa., in the fall of 1892?

A. The manufacture of a general line of store service appliances, and especially of computing scales for the various uses to which such scales are placed.

Q. 5. What sort of a computing scale was first produced by the Keystone Store Service Co. at Beaver Falls after you undertook the work there that you have referred to in your last answer?

A. Prior to the organization of the company I had produced in a small shop which I had arranged in Masonic Hall Building in Beaver Falls, a complete scale of some six or seven different types of so-called platform or counter scales, and, in addition, small spring balance which were called the Domestic, and which had a cylindrical chart of prices registering with the weight indicator upon the outside of the face.

Q. 6. What was the date of the organization of the Keystone Company?

A. The company was organized in the fall of 1894.

Q. 7. How long prior to that was it that you had worked upon the computing scale referred to by you as the Domestic?

A. More than a year prior.

Q. 8. Will you please describe the Domestic scale more fully than you have in your answer to Q. 5, stating the relative arrangement of its several parts, and also the materials employed in constructing it?

A. A casting of gray iron, having a central opening and shaped very like an ordinary cap head or box head was surrounded by a tin cylinder having a vertical opening from top to bottom. Within this, of almost identical diameter, sufficiently smaller to be moved freely by hand, were two castings of gray iron, the upper one an annular ring and the lower one a like annular ring with a flange extending beyond the periphery of the case. A paste-board chart was made fast to the two rings, and introduced within the casing. A small groove around the lower ring was entered by two oppositely placed pins through the casing and served to retain the chart in place. Centrally within the structure a spring was suspended from a ring passing through the upper casting, and attached to the ring was a hook with an elongated arm

extending outward and having a pointer adapted to register with the figures upon the chart as seen through the vertical opening. Adjoining the vertical opening upon the outer surface of the case, a vertical panel contained pound and ounce divisions corresponding with the chart.

Q. 9. Did you manufacture and market such scales as you have just described prior to the organization of the Keystone Company?

A. Ten such scales were made as early as January or February of 1893. One of those was bought by Joseph Laird, grocer, 7th avenue, Beaver Falls, and was by him used upon his butter and cheese counter. I have no knowledge of where the others went until late in '94. In 1894, immediately after the organization of the company, 240 scales of that type were shipped to Col. Wm. F. Knowles at Cincinnati; the size of the order is the only thing which fixes it on my memory.

Q. 10. How early was it that Joseph Laird put the Domestic scale into use in his store at Beaver Falls?

A. Very early in February of '93.

Q. 11. And for how long a period did it remain regularly in use there?

A. I saw it there as late as the summer of '96.

Q. 12. Do you know what became of the shipment of 240 scales that you mentioned, or what became of any of them?

A. I have no means of knowing what became of them.

Q. 13. Do you know for what particular purpose they were ordered?

A. I was told by Col. Knowles himself that they were to be used as premiums by a whisky bottling house of Covington, Ky.

Q. 14. Can you now produce something by way of an illustration of this Domestic scale as constructed by you in the years 1893 and 1894?

A. There is here a sketch which I made since I came into the building which illustrates the scale exactly, except that I think perhaps the annular rings at either end of the chart are not represented as deep as we had made them. The chart was made in this way because I had discovered that I could not attach the paper or pasteboard chart to a tin cylinder and expect it to remain easily movable within the case.

Q. 15. Will you please apply reference characters to the different parts illustrated upon the sketch which you have produced, and as you do so, schedule these parts in answer to this question?

Defendant's Exhibit
Culmer Sketch
Culmer's Domestic Scale

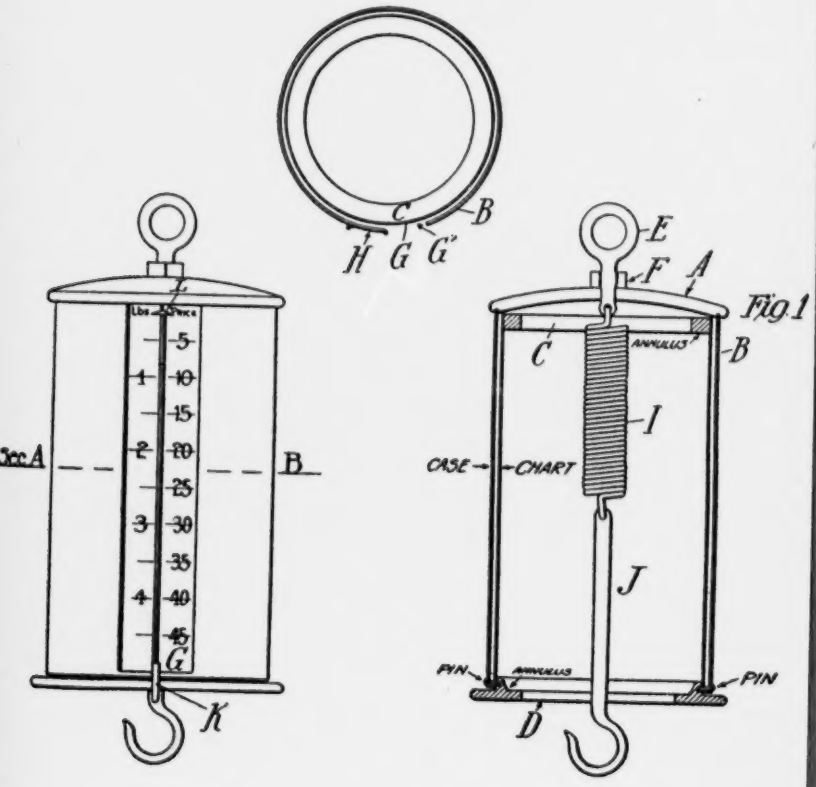

Fig. 1

A. Fig. 1 in the sketch is a vertical cross-section of the Domestic scale. A represents a gray iron casting having an opening in its center through which a screw-threaded eye bolt marked E is passed. F represents a jamb nut upon the thread of the eye bolt E. An aperture in the extremity of the eye bolt admits the end of a close-coiled spring I. And upon the opposite end of the spring I a hook J is suspended and hangs vertically therefrom. Extending outwardly from the curve of the hook rod J is an arm K, which upon the exterior of the case extends vertically upward to support a double pointer L at or near its upper extremity. The outer casing B, which surrounds the structure, is made fast to the upper casting A at its top, and at its bottom pins M pass through the outer casing and enter a groove in the periphery of the lower annular ring D so that it may be revolved upon the said pin. To correspond with the vertical rod K attached to the hook J, an opening G^2 in the outer casing B admits a view of the interior rotatable chart G from top to bottom and immediately adjoining said opening G^2, a panel H contains chart of pounds and fractions vertically corresponding with the divisions of the rotatable chart G. A pan or other receptacle placed upon or depending from the hook K has weight of any kind placed thereon; the chart G is rotated until the price desired is exposed adjoining the scale of pounds and ounces, and the value of the goods upon the pan will be indicated by the pointed L on the vertical rod K.

Q. 16. What was the approximate thickness of the material used to form the cylindrical chart in the Domestic scales that you manufactured at Beaver Falls during the time you have mentioned?

A. The charts were printed upon two-ply Bristol board; I should judge they would run in the neighborhood of .009 of an inch.

Q. 17. Were all the Domestic scales made up with this same sort of a chart?

A. They were all made with the same sort of chart, although there was a change made in the pattern for the annular rings upon which they were fastened.

Q. 18. Did the Domestic scale that Laird used in his store at Beaver Falls in 1893 have a cylindrical chart made of this same kind of material that you have described, to wit, two-ply Bristol board?

A. Yes.

Q. 19. Do you know whether that Domestic scale that Laird had in use in his store in 1893 is still in existence?

A. I do not.

Q. 20. Do you know whether ownership or possession of that scale passed from Laird to anyone else?

A. Some time prior to 1897 a clerk who had been with Laird a long while bought out the place, and the scale was still in use by Davis after he had bought Laird out.

Q. 21. Do you know of any other places of business where Domestic scales were regularly employed and came under your observation during their regular use?

A. I do not. Primarily the scale was not made for store service; it was a domestic scale.

Q. 22. Can you name any individuals who worked for you, or who were associated with you at Beaver Falls in connection with the production and manufacture of the Domestic scale?

A. Beginning with 1893, January, I had working for me in my rooms in the Masonic Building, Joseph Tatro, Charles Marquis, James Patterson, John Milburn; Milburn came early in '94; the others were all prior to that date, and two or three others whose names I do not recall. After the spring of 1894 there were numerous scale men and others employed in the factory, which afterwards became the Keystone Store Service Company's factory.

Q. 23. Do you remember one John Q. Salisbury as having worked for you at Beaver Falls?

A. I remember Salisbury much earlier than that date as having worked in Dayton when I was there in '91 and '2, but I don't think Salisbury came to Beaver Falls prior to September, '94.

Q. 24. After starting your enterprise at Beaver Falls, did you keep informed as to the product that the Computing Scale Company of Dayton was turning out?

A. I kept in touch as much as possible, of course, with everything that was being done in the computing scale industry; that is to say, when hearing of anything new I looked it up as quickly as possible.

Q. 25. Do you remember what character of computing scale, as a product of the Computing Scale Company of Dayton, first came to your notice after you had gone to Beaver Falls, that is, a product with which you had not been familiar while you were with the Dayton Computing Scale Company before going to Beaver Falls?

A. The first departure from the beam-counter scales made by the Dayton Company, I saw in the winter of '93 or '94 at Cincinnati and at Cleveland.

Q. 26. What sort of an apparatus was that?

A. It was what is called in the technology of the shop the "trip" scale, having at platform weight receiving plate on one side of its fulcrum and a beam extending on both sides of the fulcrum, and revoluble chart adapted to register with the point at which the poise upon the beam registered, giving values at a specified price to be obtained by turning the chart to the point at which that price registered with the pointer.

Q. 27. Please look at "Defendant's Exhibit Dayton Cylinder Scale," which is here present, and then state how that compares with the scale that you saw at Cincinnati and at Cleveland in the winter of '93 or '94.

A. That is in every essential the same scale.

Q. 28. Where were these Dayton cylinder scales that you saw in Cincinnati and Cleveland, and what use was being made of them?

A. The one at Cincinnati was in a store at the corner of the square by the fountain as you turn to go to the United States Court. I do not recall the names of the streets in Cincinnati. The other was in a store on Ontario street in Cleveland, near the Market House.

Q. 29. Were these scales in use at those stores at the time you saw them?

A. I saw neither of them being used, but they were upon the counters in their respective stores. There was no objection made to me examining them. They were comparatively new and bright. They were both all full nickled scales, and showed evidence of having been used.

Q. 30. Of what material was the rotary chart in those scales composed?

A. The chart itself was printed upon cardboard or other heavy calendar paper, and the ends were of gray iron, I supposed, although the nickel-plate might show or hide the material. They were mounted upon a central rod or arbor of drawn steel. Of course, I did not remove the case to determine, but it seemed to me from my manipulation of the chart that the ends were solid castings.

Q. 31. After having observed these Dayton cylinder scales in the stores at Cincinnati and Cleveland, did you continue

to come across similar scales upon the market in those cities, or at other places?

A. I was shown later, I think early in '95, scales made by W. F. Simpson having flat charts that were being marketed, and an experimental scale, trip scale, having a revoluble chart, which I was informed they had not made for the market. I was shown both platform and trip scales having revoluble charts made by John H. Milburn, which had been marketed to a considerable extent in St. Louis by a company with which he was connected. Milburn came into my employ in 1894, and among the stuff he brought from St. Louis was a scale which he said was made in 1892, having a revoluble chart attached to the base.

Q. 32. Do you remember of what material the revoluble chart of this Milburn scale was composed that Mr. Milburn had with him when he came to Beaver Falls from St. Louis in 1894?

A. My impression is it was of Bristol board, or very heavy calendar paper.

Q. 33. Do you recall in what manner the chart was supported, and how the revoluble structure was made up and mounted upon the scale, in that Milburn article?

A. I never saw the chart taken apart, but from the indications on the outside of the chart I should infer that it had four disks; the paper having been sunken between the disks forming three depressions in the full length.

Q. 34. The edges of the disks were visible, were they?

A. The edges of the disks were visible, the paper having sunk between them.

Q. 35. And how were the disks mounted?

A. There was a central rod or arbor resting in two bearings upon the base, one at either extremity, and a small knob extending to the right upon the arbor.

Q. 36. What was the occasion for your being shown the Stimpson scales and the Milburn scales early in 1895?

A. Stimpson at that time was endeavoring to interest capital in the organization of a company to manufacture his scales, or to make terms with someone already manufacturing scales to take up and manufacture scales under his patents.

Q. 37. How early in the year 1895 would you say it was that you were shown the Stimpson and Milburn scales in the connection just mentioned by you?

A. The Milburn scales I was shown as early as Septem-

ber of '94 and it must have been as late as August or September of '95 that the Stimpson scales came to my attention.

Q. 38. Were you ever concerned in any way in litigation that had to do with the product of the Computing Scale Co. of Dayton, of which you saw specimens at Cincinnati and Cleveland, as heretofore referred to by you?

A. I was asked in '96 to assist the defense, which was Stimpson, in a suit brought against them by the Dayton Computing Scale Company for an alleged infringement on the Lutie Kepler patent.

Q. 39. Please look at "Defendant's Exhibit Kepler Patent," and state if you know whether that is a copy of the patent to which you refer in your last answer.

A. As I remember the issue, the basic issue was upon a beam extending on both sides of the fulcrum of the weight-bearing lever, and, as shown, this would not cover that issue. The exhibit upon which the Dayton Company rested at that time was a small postal or candy scale in which the beam extended just as the beam on this side of "Defendant's Exhibit Dayton Cylinder Scale" does to the rear of the fulcrum.

Q. 40. Do you find "Defendant's Exhibit Kepler Patent" to be a copy of a patent with which you have heretofore had any familiarity?

A. This "Defendant's Exhibit Kepler Patent" answers to the type of scale which was used as an exhibit in the Kepler vs. Stimpson case, referred to.

Q. 41. Was the exhibit in that litigation such a scale as "Defendant's Exhibit Dayton Cylinder Scale?"

A. No, it was a very much smaller structure, and the beams and chart were very much nearer centrally situated with the fulcrum; that is to say, both beam and chart extended very much more beyond the fulcrum to the rear of the scoop or other weight receiving device.

Q. 42. What sort of a chart did that exhibit have?

A. It had a chart constructed almost identically as this is except as to the size. It was a very much smaller chart; not more than 2½ inches in diameter, by perhaps 10 or 11 in length.

Q. 43. Of what material was the chart composed in that exhibit?

A. My impression is it was of cardboard varnished. It had been lithographed, and the ink of the lithographing seemed covered by varnish.

By Mr. Davis: The sketch produced by the witness is of-

fered in evidence, and the Notary is requested to mark the same "Defendant's Exhibit Culmer's Sketch."

Direct examination closed.

Cross-Examination by Mr. Scott.

X-Q. 44. Mr. Culmer, will you please state what business you were engaged in prior to the period regarding which you have testified, that is, prior to 1890?

A. Well, as a boy, my father was in charge of the counter scale department of the old Pittsburgh Novelty Works, Livingston, Roggen & Co., Livingston, Copeland & Co., Adams, McKee & Co., Morehead, Adams & Co., and M. Moorhead & Co., extending through from the early '30's up until the close of the Civil War. As a boy my playground was the scale department.

My father was lost on the Arctic in 1854, and immediately thereafter I was put on the force of the Novelty works, and in the scale department as a boy. After my service during the Civil War I returned to the Novelty works, and at the time of their utter destruction by fire in '67, the superintendent, Mr. Jacob Kinzer and myself started the Artisan Works in Pittsburgh, one of our outputs being counter scales. In '76 I went to Russia, and was engaged there and in Asia until I returned in '82; in '82 I joined the Logan & Strowbridge Iron Co., and part of our output was scales, over which I had general supervision. I devised several devices for natural gas while with Logan & Strowbridge, and during '87 and '88 was engaged in perfecting and marketing those with the Metric Metal Co. of Beaver Falls, now of Erie, Penn. In January of '89, I was engaged by the president of the Pittsburgh Company as chief engineer in their several propositions. The town of Elwood, the Beaver Short Line Railway, the Beaver & Elwood Railway, and during that and the succeeding year I also kept my experimental room busy upon computing scales. In 1890 I went to England and the Continent to bring new industries for the City of Elwood. I arranged for a seamless drawn tubing mill and the employees to operate it, and for a wrought iron and steel enameled iron plant and the employees to operate it. I returned in 1890, and during that year a patent which had been taken out during my absence for one Merritt Green, general manager of the Pittsburgh company, and which was assigned to him as having originated in his conception of computing scale was brought to the attention of the Dayton company, and in April

of '91 I was engaged by Mr. Ozias to begin giving them one-half of my time at Dayton in the perfecting of the devices they were already working upon, and of the computing scale which they had in the meantime purchased from Merritt Green.

XQ. 45. In your direct testimony you have referred to several scales having computing cylinders, among them the Milburn scale, the Stimpson, the Domestic and the Dayton cylinder scale. In any of these cylinder scales which you have referred to was the cylinder automatically revolved by the weight of the commodity being weighed?

A. No.

XQ. 46. As I understand it, the cylinders in all of these scales were revolved by hand?

A. The cylindrical chart in all of these devices was turned by hand until the price per pound desired was brought into registry with the indicating device on the poise.

XQ. 47. These various cylinder scales were provided with knobs upon the cylinders for the purpose of making it convenient to turn them, were they not?

A. Knobs or their equivalent. In the Domestic a flange extended beyond the cylinder, which was touched by the fingers.

XQ. 48. What do you understand to be the purpose of using a cylinder in such scales for bearing the computations, that is, what particular object was sought by the employment of the cylinder?

A. Well, the cylinder renders it much easier to protect the chart from defacement by enclosing it in a cylindrical case, and it affords much greater surface for computations because of its form, allowing a large number of computations to be concealed in a small space.

XQ. 49. What other kinds of computation charts were in use at the time you saw the various cylinder scales regarding which you testified on direct?

A. The other charts that I have seen embrace either flat rectangular cards, in some instances reversible upon a central trunnion, like the Stimpson chart, or fan-shaped, as was shown in some of the earlier scales of Milburn.

XQ. 50. Circular dials were also in use in connection with a revolving finger, were they not?

A. Yes.

XQ. And in some of these scales having flat circular dials and flat, fan-shaped charts, the movement of the index or fin-

ger was automatically caused by the weight of the commodity, was it not?

A. It was.

XQ. 52. But at the time you saw the cylinder scales regarding which you have testified on direct examination, there was no scale in existence, so far as you knew, was there, in which a cylindrical chart was automatically revolved by the weight of the commodity upon the pan or platform?

A. I had never seen one that was operated.

XQ. 53. You had seen some, had you, that were not operable?

A. Well, up until 1894 or '5 I cannot recall that I had ever seen one that had been sold.

XQ. 54. Will you state if you knew at the time and still remember why it was that certain scales having automatically revolving cylinders were not operable?

A. As early as the winter of '92 and '3 I had constructed a full-sized model of such a scale, changing it materially from the patent which it was supposed to represent; but in every respect, so far as my knowledge went, the changes were beneficial. I could not find any other cause for its failure to work except the fact that I could not counterbalance out the weight of my clyinder.

XQ. 55. What patent did you have reference to in your previous answer?

A. The Phinney patent.

XQ. 56. I show you a copy of a patent granted to one W. H. Phinney, on August 30, 1870, and bearing the number 106,869, and ask you if that is the Phinney patent to which you have reference?

A. It is.

XQ. 57. What were the defects in operation of this scale which you attempted to make along the lines of the Phinney patent?

A. Excessive friction. I could not succeed in getting it to stop twice within one ounce of the same weight.

XQ. 58. Do you know of any scale now in use having a cylinder automatically revolved by the weight of the commodity upon the pan or platform?

A. I have seen such scales as you describe with the trademark of the Dayton Company on them. I do not know of any other cylinder scale that I have noticed within the last two or three years except those made by the Dayton Company.

XQ. 59. Is your answer confined to scales such as are suspended from above, as shown in the Phinney patent?

A. No. Whether suspended scales or counter scales, those which I have noticed of late have all borne the Dayton mark.

XQ. 60. A scale which will not register twice within an ounce of the same reading when the same weight is on the platform is not a commercial scale, such as could be used under the restrictions as to accuracy imposed upon scales, is it?

A. A scale which will not register within a very small fraction of an ounce is certainly not an implement of precision, and as I understand the law, is not a commercial article at all.

XQ. 61. Can you explain the differences in construction which have brought about the use of the Dayton automatically revolving cylinder scale, that is, the differences between that scale and the one which you say you built in 1892 or 1893?

A. As I have had no opportunity to analyze the Dayton structure, it would be a very difficult matter to make a good answer to the question. Broadly speaking, I presume that the Dayton people have succeeded in making a cylinder of almost inappreciable weight and supported it in almost frictionless bearings.

XQ. 62. The friction bears a direct relation to the weight of the cylinder, does it not?

A. Under the very best conditions it does. There may be other structural defects which would increase it, but I don't know of any, as I have tried a great many, that will eliminate any part of the friction due to the absolute direct weight of the cylinder.

XQ. 63. Did you ever perfect the automatically revolving cylinder scale which you made in 1892 or 1893?

A. I did not.

XQ. 64. Would that scale have been rendered operative and successful if you had replaced the cylinder which you used by a cylinder constructed of the material and according to the proportions of the cylinders forming part of the cylinder scales regarding which you testified on direct, namely, the Milburn, Stimpson, Domestic and Dayton cylinder scales?

A. The cylinder upon the experimental scale, upon which I wasted many months, was made as nearly as might be structurally like the cylinder of the Domestic scale, except that it was 9 inches in diameter as against about 2½.

XQ. 65. I believe that you stated the supporting rings at the top and bottom of the computing cylinder of the Do-

mestic scale were made of gray cast iron. Did you ever see an operative and successful automatically revolving cylinder scale having the spiders or rings which support the cylinder chart made of cast iron?

A. No, none that I have ever taken apart.

XQ. 66. Is cast iron a material which is ordinarily used when it is desired to make a structure of light weight?

A. Well, as an engineer, of course, the answer would depend very much upon the character of the structure. In the scale industry gray iron is seldom used for any portion of a scale desired to be light. On the other hand, such members are made of stamped sheet metal or alloy, or of castings of some light alloy.

XQ.67. In the various cylinder scales regarding which you testified on direct, was there any necessity for making the cylinder of extreme lightness? I refer to the scales in which the cylinder was turned by hand?

A. No.

XQ. 68. Who was the Mr. Ozias to whom you referred in one of your previous answers?

O. Orange Oscar Ozias, general manager of the Dayton Computing Scale Co.

XQ. 69. I invite your attention to the computing cylinder forming part of "Defendant's Exhibit Dayton Cylinder Scale," and ask you whether your long experience in the scale art enables you to state whether a cylinder of such construction, that is, having cast iron ends and a cardboard cylinder, could be used in the construction of a scale in which the cylinder is automatically revolved by the weight of the commodity on the platform or pan? In asking whether such a cylinder could be used, I mean whether it could be used to form a part of a scale that would give accurate readings.

By Mr. Davis: Question objected to as incorrectly denoting the character of material of which the chart is composed in the cylinder of "Defendant's Exhibit Dayton Cylinder Scale."

A. The question is one of those things that really one couldn't positively answer without some experiment. A chart of this diameter and of this length would require additional length to the arbor, and my judgment is, additional weight to the arbor, because of the shocks it would be subject to under the best circumstances; then it would require at least one, and perhaps two pinions upon the arbor, and the bearings would necessarily be outside of those pinions. Certainly

if it was made as heavy as this, the friction would be too great for accuracy.

XQ. 70. Did you ever perform experiments with automatically revolving cylinder scales other than the construction of the scale which you made in 1892 or 1893?

A. Yes. While with the National Computing Scale Company, about 1899 or 1900, a scale was brought to us, a perfectly beautiful scale in everything except operability, which contained a cylinder and a dial on each head, pounds and ounces being indicated by a pointer upon a dial forming each head of the drum, and pounds and onces also being read from the central scale of the drum through the aperture. I experimented with that scale to the extent of making all of its spiders of aluminum, but had in a minor degree the same difficulty that I had with the Phinney scale.

XQ. 71. What was the cylindrical part of the drum made of in the scale referred to in your last answer?

A. It was white board or indurated linen fibre, very hard, and about No. 16 gauge thick, or in the neighborhood of a sixteenth of an inch thick.

At this point an adjournment was taken to 2 p. m.

Two p. m.

Met pursuant to adjournment. Same parties present.

XQ. 72. In an automatically revolving cylindrical scale, does an increase in the weight of the revolving cylinder produce any objectionable effects other than the increase in the friction at its bearings?

A. The increased weight of the cylinder would also add to the momentum with which the cylinder would be revolved under a load. If the greater portion of that weight were at the periphery of the cylinder, the shock due to that momentum would be difficult to overcome; and, of course, that feature would be objectionable in spite of dash-pots or other shock arresters.

XQ. 73. If the cylinder of an automatically revolving cylinder scale were of such heavy construction as would be brought about by the use of cast iron ends and a cardboard cylinder, what, if any, difficulty would arise in attempting to overcome the momentum of the cylinder by the use of a dash-pot or other form of arresting device?

A. The cylinder would come to a rest at a point possibly not the point at which it should if perfectly accurate.

XQ. 74. Then, as I understand you, the use of a dash-pot will not impart accuracy to an automatically revolving cylinder scale unless the cylinder itself be of sufficient light construction to avoid an objectionable degree of momentum; is this right?

A. The dash-pot will only assist to the extent of preventing the rotating effect being continuous for a long time, due to the momentum in any case. If the cylinder is accurate without the dash-pot it will come to its accurate place of rest after several vibrations or partial rotations. With the dash-pot it will come to that same accurate resting place, with perhaps one or two vibrations or partial rotations. If it is inaccurate of itself it will be just as inaccurate with the dash-pot or other shock arrester as it is without . The inaccuracy will be discovered that much quicker, that is all.

XQ. 75. Is there any limit to the degree of dampening or resistance that can be imposed upon an automatically revolving cylinder in a scale such as we are discussing; I mean with relation to the accuracy of the readings secured from the scale?

A. I have never seen the dash-pot or other devise so closely adjusted that it would not permit an accurate indicating device to indicate accurately, although I have known them to be adjusted so slowly that the indicator came to the accurate point so slowly as to almost require as much time as an indicating scale without the shock arrester.

XQ. 76. In order to cause the cylinder of an automatically revolving cylinder scale to come to rest in a given time, as it necessary to impose more or less resistence or dampening effect by means of the dash-pot when a heavy revolving cylinder is employed than when a lighter cylinder is employed?

A. The greater the weight of the cylinder brought into momentum, the greater dampening effect is required to overcome its momentum.

XQ. 77. Have you ever seen spring scales in which the weight of the commodity upon the pan or platform imparted automatically rotation to a finger or index which moved in front of a dial bearing weight or price indications?

A. I have seen many such. So far as weight is in question such scales have been made by Forschner & Co. and John Chettelaine & Sons for many years; also scales having a pointer to indicate the weight upon a weight dial, and a price pointer to indicate prices upon a price chart dial have been made by the National Computing Scale Co., The Computing

Scale Co. of Dayton, the National Co. of Chicopee Falls, and others that I cannot at this moment recall.

XQ. 78. At how early a date did you first see such scales as you have referred to in your last answer?

A. I have seen scales answering to the scales made by Chattelaine and Forschner for at least forty years. The computing scales having dial or revoluble charts referred to in the latter part of that answer only extend backwards to perhaps '96.

XQ. 79. Were dash-pots or other arresting devices used in the Forschner and Chattelaine scales?

A. Never to my knowledge.

XQ. 80. In the Chattelaine and Forschner scales were any thermostatic devices used for the purpose of maintaining the uniform action of the springs under different conditions of temperature?

A. Never to my knowledge.

XQ. 81. And the Chattelaine and Forschner scales were used extensively, and still are used extensively, are they not, throughout the country with the approval of the officials entrusted with the execution of the laws upon the subject of weights and measures?

By Mr. Davis: This line of examination is objected to as wholly irrelevant and immaterial to any issue in the present cause.

By Mr. Scott: The relevancy of the question lies in the issue of this case upon the question of invention, and is directed to establish the fact that the solution of the problem of making a practical automatically revolving cylinder scale was not due to the introduction of accessories such as thermostats and dash-pots.

By Mr. Davis: Inasmuch as the direct examination of the witness was conducted solely with reference to questions of fact concerning the prior state of the art, the line of inquiry now being conducted on cross-examination is objected to as without foundation in the direct testimony, and in further pursuing this, or similar lines of inquiry, complainant's counsel is warned that he makes the witness his own.

By Mr. Scott: The question relates to the prior art, and according to counsel's statement that is what the direct examnation was based uuon. The witness may consider the question as limited to the conditions prevailing prior to May 2nd, 1895.

A. I have never seen a pneumatic dash-pot or other shock

arresting device applied to a scale prior to the date named by counsel.

XQ. 82. But prior to that date you did see the Chattelaine and Forschner scales in extensive use, did you not?

A. Yes.

XQ. 83. I invite your attention to "Defendant's Exhibit Dayton Cylinder Scale," and ask whether you find any provision upon that scale for reading the price or value from opposite sides thereof?

A. In this structure there is no provision for reading the price and value except through the one slot, or opening, upon the operative side.

XQ. 84. As I understand your previous testimony, the use of a dash-pot or other arresting device has nothing to do with the operativeness or accuracy of a scale, but that such devices are merely used for the purpose of causing the scale to come to rest more speedily for the purpose of saving the time of the party using the scale; is this correct?

A. Primarily, yes; and secondarily, to save wear and tear upon the operating parts.

XQ. 85. In answer to direct question 3, you stated that in the years 1891 and 1892 your services were retained by The Computing Scale Company of Dayton, and that you were engaged in perfecting their counter platform beam scale. Was this a computing scale?

A. It was.

XQ. 86. Will you state briefly the manner in which the computing was brought about?

A. That scale was of the ordinary counter compound-lever platform type, having a weighing beam moving upon a fixed fulcrum, and a fixed multiple of leverage, and adjustably connected therewith a computing beam having a movable fulcrum, so that articles weighed at the fixed rate, sixteen units to the pound, might be weighed upon the upper beam at any value per pound from three to eighty.

XQ. 87. You have stated that this counter platform beam scale was the only scale manufactured by the Computing Scale Co. of Dayton for the market while you were with them in 1891 and 1892. Were they manufacturing or working on other scales which were not ready for the market?

A. There had been some experimental work done upon a trip scale, and also upon one or two types of spring balance.

XQ. 38. Were the efforts of the Computing Scale Co. of Dayton at this time directed to the improvement and perfection of computing scales?

A. That was their declared object.

XQ. 89. Was it while you were with the Compnting Scale Co. of Dayton in 1891 or 1892 that you experimented with an automatically revolving cylinder computing scale?

A. No.

XQ. 90. Did the Dayton Computing Scale Company, or its officers or employees know of your experiment with the automatically revolving cylinder computing scale?

A. I did no experimenting with an automatic revolving drum scale, computing scale, while at Dayton, and it was late in the fall or early winter of '92 that I began experiments upon the so-called Phinney type of scale at Beaver Falls.

XQ. 91. Why is it that you employ the term "trip" in connection with scale such as "Defendant's Exhibit Dayton Cylinder Scale?"

A. That has been a shop term for a scale to take the place of an even balance scale, the trip scale having its weighing plate or weight receiver upon one side of its fulcrum, and nothing but a beam extending to the other side of the fulcrum.

XQ. 92. Then this scale which is in evidence as "Defendant's Exhibit Dayton Cylinder Scale" is merely one of the old trip scales with a computing cylinder mounted on its base?

A. That is all in shop parlance.

XQ. 93. You have stated that the Domestic scale manufactured at Beaver Falls had a chart printed upon two-ply Bristol board, which you judge ran in the neighborhood of .009 of an inch thick. Upon what do you base this estimate of the thickness of the Bristol board?

A. Upon my judgment from the fact that I on several occasions have had to caliper Bristol board of various thicknesses.

XQ. 94. Have you any idea of the thickness of ordinary typewriter paper, such as this deposition is being written upon?

A. I should say in the neighborhood of .0003 of an inch thick.

XQ. 95. What kind of bearings did you use for the revolving cylinder in the automatically revolving cylinder scale which you experimented with in 1892 or 1893?

A. I experimented with knife-edge journals, with needle points inserted into the ends of the arbor, and with oppositely placed rollers; the arbor resting upon said rollers.

XQ. 96. In answer to XQ. 69 you stated that if a cylin-

drical chart like that forming part of "Defendant's Exhibit Dayton Cylinder Scale" were used in an automatically revolving cylinder scale, your judgment was that the arbor would have to be heavier because of the shock it would be subject to. I presume that the shocks you refer to are those arising from the momentum of the structure when it revolves under the weight of the load, this momentum being compounded of the weight of the cylinder and the velocity with which it moves?

A. The shocks referred to are about equal when the load is placed upon the weight receiver and when the load is removed from the weight receiver, and if there is any possibility of the arbor springing there would be liability to damage or speedy destruction of the rack and pinion upon which the accuracy of the structure depends.

XQ. 97. When the revolving cylinder is made of very light construction the difficulties to which you have referred in your last answer are largely obviated, are they not?

A. Just in the degree the momentum is reduced.

XQ. 98, And the momentum varies directly with the weight, does it not?

A. Yes.

Re-Direct Examination by Mr. Davis.

RDQ. 99. To what did you attribute the inability to counterbalance the cylinder in your automatic scale of 1892-1893?

A. To the fact that I could not succeed in eliminating the friction from its journals.

RDQ. 100. To what did you attribute the inaccuracy of the later automatic scale which was submitted to you in 1899 or 1900, and which you stated you worked upon, among other things employing aluminum spiders and white board or indurated linen fiber for the chart?

A. I would explain here that the white board or indurated linen chart was the chart as I received it. I removed the two heads and replaced them with aluminum spiders, but the machine also carried a heavy counterbalanced pointer upon each end of the arbor, and I never succeeded in overcoming the friction due to chart and pointers.

RDQ. 101. How do you find the chart of "Defendant's Exhibit Dayton Cylinder Scale" is made up?

A. It has been constructed by rolling upon a mold a thin paper cylinder of, I suppose, a length sufficient to make a

thickness or stiffness desired by the manufacturer, and upon the cylinder so made, after having dried, or perhaps before being dried, a chart has been pasted onto the thin paper cylinder.

Re-Cross Examination by Mr. Scott.

RXQ. 102. As I understand you, the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" is made by rolling a sheet of paper around a mold until the completed cylinder consists of a number of layers of the paper used; is that correct?

A. Yes.

By Mr. Scott: Counsel for complainant offers in evidence patent 106,869, granted to W. H. Phinney, August 30, 1870, and requests the Notary to mark the same "Complainant's Exhibit Phinney Patent."

JOHN W. CULMER.

JOHN H. MILBURN, a witness called by the defendant, having first been duly sworn, testified as follows, to questions put by Mr. Davis:

Q. 1. Please state your name, age, residence and occupation.

A. John H. Milburn; age, 66; Detroit, Mich.; electrician.

Q. 2. Where were you employed, and what doing, in the early '90's?

A. I was with the Dayton Computing Scale Company.

Q. 3. Where was the factory of that company located at that time?

A. It was in what they call the old Power Building, owned by Callahan.

Q. 4. About when did you go to work for the Computing Scale Co. at Dayton?

A. 1891.

Q. 5. And how long were you employed by that company?

A. I left there in July, '93.

Q. 6. What sort of work were you on during the time that you worked for the Dayton Computing Scale Company?

A. First I was inspecting scales, and then I was put in the experimental room.

Q. 7. Do you remember about how long after you first

went to work for that company you went onto experimental work?

A. It was in July of '91.

Q. 8. And did you continue on experimental work up to the time you left, in July, '93?

A. Yes, sir.

Q. 9. Do you remember what sort of scales the Dayton company was making during the time you were employed by it?

A. The first scale they made was the platform computing scale, that is, counter platform.

Q. 10. Was that the only kind of scale that was made in the factory of the Computing Scale Company while you were there?

A. No. There were others. One that was next to the platform in manufacturing was what they call a Tea scale, a long beam.

Q. 11. What sort of a scale did you work on experimentally while you were there?

A. The first that I took up was Culmer-Green patent, an automatic butcher scale—I will have to correct myself there, it wasn't automatic at all.

Q. 12. Now, what others did you work on?

A. I worked also on the platform scale, developing the clutch part.

Q. 13. Were there any other types of scales than those you have mentioned that you worked on while you were in the experimental department of the Dayton Computing Scale Co.?

A. Yes. There was what they call the Butterfly scale. That was a chart scale.

Q. 14. Did the tea scale that you spoke of have any computing arrangement on it?

A. No computing chart, it was simply a movable price poise, same as the platform.

Q. 15. Now, about this butterfly scale, was that a computing scale?

A. Yes, sir.

Q. 16. What kind of a computing arrangement did it have?

A. The charts went over on each side of the beam on an angle about 45 degrees, I guess.

Q. 17. Were any other kinds of computing charts used in any of your experimental work at that period?

A. Not up to that time. Later on Mr. Ozias came to me with a idea of a cylinder chart scale.

Q. 18. About when was this?

A. That was along in August or September of '92.

Q. 19. Did you do any work on this proposition that Mr. Ozias brought you?

A. Yes.

Q. 20. Was a scale built to embody that idea that he put before you?

A. Yes.

Q. 21. Who did the work on the building of that scale?

A. Have you reference to the first scale?

Q. 22. Yes, who did the work on the first scale of that kind?

A. I done the biggest portion of the work on this first scale.

Q. 23. Do you remember any one else who did any of the work on it?

A. I think William Tillbury done some work on that, and also John Salisbury, but I can't go any further on the outside work.

Q. 24. Please look at the scale we have here, marked "Defendant's Exhibit Dayton Cylinder Scale," and state how that compares with the scale that you worked upon in 1892 to carry out Mr. Ozias' idea, the idea put before you by Mr. Ozias.

A. It is similar in principle, only the chart was penned in pen and ink instead of being printed.

Q. 25. What material was used for the chart of that first scale?

A. The paper was rolled on a form and glued together, and the printed sheet over that again—not the printed, but the penned sheet.

Q. 26. And on what was that chart put; what was it mounted on; what was the cylinder put onto?

A. The end pieces were similar to what they are in the exhibit scale.

Q. 27. To what were those end pieces fastened?

A. They were fastened with a rod running through the center of the cylinder.

Q. 28. About when was it that the work was completed on this first scale having the computing cylinder?

A. That was in the late fall of '92.

Q. 29. Do you remember what was done with the scale after it had been completed?

A. We set to work making patterns then for the regular scale, and I think the first scale was sold along November or December of that year, I wouldn't be positive, but somewheres in that neighborhood.

Q. 30. Were such scales being regularly manufactured in the factory of the Computing Scale Co. of Dayton before you left their employ, in July, of 1893?

A. Yes, sir.

Q. 31. And for how long a time before you left had this been the case?

A. About six months.

Q. 32. How were the figures and marks put on the chart in the scales that were being regularly manufactured during that period?

A. Well, they were printed.

Q. 33. Where did you go upon leaving the employment of the Dayton Computing Scale Company, in July of 1893?

A. To St. Louis.

Q. 34. Do you remember what part of the Callahan Power Building the Computing Scale Co. was occupying at the time you left?

A. They were occupying basement, second, third and fourth floors.

Q. 35. Do you remember whether they had previously occupied any other part of that building?

A. They started first on the first floor only and the basement.

Q. 36. Where was the experimental work done at the time when the first floor was occupied by the Dayton Computing Scale Company?

A. It was a room just back of the office on the first floor.

Q. 37. Do you remember whether the work upon that first scale like the "Defendant's Exhibit Dayton Cylinder Scale" was done before the Dayton Computing Scale Company vacated that first floor?

A. The main portion was done before they vacated, yes.

Q. 38. Do you remember whether any more scales of that type were made before the Dayton Computing Scale Company vacated the first floor?

A. Yes, there was some; I don't know how many, though.

Q. 39. Do you remember whether the patterns for the

regular manufacture of this type of scale had been completed and used before the company vacated that first floor?

A. To the best of my knowledge the most of them were made then.

Q. 40. What work did you engage in at St. Louis upon going there from Dayton in 1893?

A. I went there to manufacture my own patent of a computing scale.

Q. 41. Did you do any manufacturing at St. Louis of computing scales?

A. Yes, sir.

Q. 42. When did you carry on this manufacturing there of computing scales, during what period of time?

A. Part of '93 and '94.

Q. 43. What sort of a computing arrangement did that scale have which you manufactured at St. Louis?

A. Well, my counter platform type consisted of a chart on the upper beam and a cylinder on the lower part of the base.

Q. 44. What was on the cylinder?

A. My idea in getting up the thing was to adopt it as a general computer. It would compute the even pounds up to 50 pounds, and the fraction of a pound was denoted on the chart above.

Q. 45. How was the cylinder of that scale used; that is in what manner was it worked?

A. Revolved with a thumb knob.

Q. 46. How was this revolving cylinder made up, that is, of what parts and what materials?

A. It was made up of a cardboard form, and a printed chart was glued to that, with end pieces and a rod running through the center.

Q. 47. How did it compare in makeup with the cylinder of this scale you have here, "Defendant's Exhibit Dayton Cylinder Scale"?

A. As near as I can see, just about the same makeup as the exhibit there.

Q. 48. About how many of those scales with that rotary cylinder did you manufacture at St. Louis?

A. I think we only turned out forty of them; about forty.

Q. 49. What became of them?

A. Well, some were sold, and—well, partly sold. I don't know if some of them laid there and we didn't sell them.

When the business closed up I don't know what became of some of them really.

Q. 50. Were some of them sold during the time you were at St. Louis?

A. Yes, sir.

Q. 51. When did you leave St. Louis and where did you go from there?

A. While in St. Louis Mr. Culmer and I corresponded for a year or so, and finally he asked me to come to Beaver Falls and take up the work with him, which I did in '94, July, I think it was.

Q. 52. Did you take along any of your work that you had been doing at St. Louis when you went to Beaver Falls?

A. Yes, I did. I took some scales that were partly finished. Also some odd patterns.

Q. 53. Did any of these partly finished scales that you took to Beaver Falls have on them cylinders like those you have described?

A. There was only two had cylinders on.

Q. 54. Did you show that construction to Mr. Culmer when you arrived at Beaver Falls?

A. Yes, sir.

Q. 55. During the time that you were at St. Louis did you continue to know about the marketing by the Dayton Computing Scale Company of scales like this exhibit "Defendant's Exhibit Dayton Cylinder Scale"?

A. Yes, I kept track, of course, on account of being in business, of things.

Q. 56. And did you continue to keep track and know about those scales being marketed after you went to Beaver Falls?

A. Well, not so much after I went to Beaver Falls, although I knew they had been manufacturing them.

Q. 57. Did you know about the numbering system used in the Dayton factory to number the scales going on the market?

A. When they started on the platform scale they started from "1." No. 2 was one I first made them complete, and that is the one that went on the market first.

Q. 58. Do you remember what number was used to start the series of scales like this Exhibit Scale?

A. As near as my memory can carry me I think they started on a high number, but what number exactly I couldn't say.

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Q. 59. What sort of work was going on at Beaver Falls when you went there in 1894?

A. Well, Mr. Culmer was just getting patterns ready, and tools and so forth, and he had made, I think, a couple of small scales before I went, and I think he sold those scales to a man—I can't just think of the name now.

Q. 60. Could you describe the small scale that Mr. Culmer was making then?

A. It was a spring scale, suspended, a suspension spring scale, with a cylinder standing upright.

Q. 61. What was that cylinder for?

A. Why, there was a paper chart inside of the cylinder.

Q. 62. What kind of a paper chart?

A. It was printed, denoting price per pound and value also, and it was revolved from the bottom by an outside ring a little larger than the circumference of the cylinder.

Q. 63. To what was this paper chart fastened in that scale?

A. Well, in that case the chart was fastened at the top, suspended from the top.

Q. 64. Please look at the drawing that is in evidence as "Defendant's Exhibit Culmer Sketch" and state how the construction illustrated there compares with the construction of that small scale that you say Mr. Culmer was making when you went to Beaver Falls.

A. The drawing is just the same; yes, sir.

Q. 65. Do you remember whether the manufacture of that small scale continued after you arrived at Beaver Falls and joined Mr. Culmer?

A. Yes, sir; it did.

Q. 66. Do you know if any of those small scales are still in existence, or any place where one can be secured or seen or examined?

A. Oh, there must be one somewhere, but just where I couldn't say at the present time.

Q. 67. How about the scales that you made at St. Louis with the rotary cylinder? Do you know where one of those could be gotten hold of?

A. I guess I do. I think there is one in Dayton; I could get one in Dayton; I know pretty near where it is.

Direct examination closed.

No cross-examination by Mr. Scott.

JOHN H. MILBURN.

At this point, 5 P. M., an adjournment was taken to December 30, 1911, at 10 A. M.

December 30, 1911, 10 A. M.

Met pursuant to adjournment. Present as before.

CLARENCE H. HAPGOOD, a witness called by the defendant, having been first duly sworn, testified as follows in answer to questions put by Mr. Davis:

Q. 1. Please state your name, age, residence and occupation.

A. Clarence H. Hapgood; age, 42; occupation, inventor; residence, Toledo, Ohio.

Q. 2. Where are you employed at the present time?

A. Toledo Computing Scale Company.

Q. 3. What is the product that is manufactured by that concern?

A. Pendulum scales, both fan and cylinder type.

Q. 4. Please state briefly what your schooling and experience has been in the scale business.

A. I was with the Dayton Company for a period of nearly ten years; I have been with the Toledo Company a little over six years.

Q. 5. Can you give the date when you first went to work for the Dayton Company?

A. April, 1894.

Q. 6. And when did you leave that company?

A. In November, 1903.

Q. 7. What was the character of work that you were put on when first employed by the Dayton Company?

A. Myself, together with another man, had a contract for making the counter levers for their standard market scales.

Q. 8. What different sorts of scales were being regularly manufactured by the Dayton Company at the time when you entered its employ?

A. They were making a standard market scale of a change of leverage principle, and also making a grocer, butter and tea scale which had a computing cylinder rigidly fastened to the base of the scale. The poise on the beam on this scale simply indicated to figures on this cylinder through a value opening exposed through a glass which covered a slot.

Q. 9. What was the makeup of the computing cylinder of that scale you last mentioned?

A. It consisted of a shaft, two light cast iron heads, and

stretched around these heads was a paper cylinder, having the computations and values at different prices per pound.

Q. 10. Please examine the scale that is here present marked "Defendant's Exhibit Dayton Cylinder Scale" and state how it compares with the tea and butter scale which you state was being regularly manufactured by the Dayton Company when you entered its employ.

A. That is one of the scales they were manufacturing at that time, and from the shape of the platter on this exhibit I would call that one of their butter scales.

Q. 11. Please consider the cylinder of this exhibit scale, and state what you find its construction to be, and how that construction compares with the construction of the cylinder in the tea and butter scales that were being manufactured by the Dayton Company at the time you entered its employ.

A. In looking at the chart on this exhibit scale I find it to consist of a shaft, two light cast iron ends or heads covered by a printed paper cylinder, which has the values for different prices per pound printed on same. It compares identically with the cylinders on scales which were made at that time.

Q. 12. During how long a period of time following your entering the employ of the Dayton Company did it continue to regularly manufacture scales like or similar to, or employing such cylinders as in the exhibit scale "Defendant's Exhibit Dayton Cylinder Scale"?

A. I know it continued through '94, '95, '96, because in '96 and '97 I worked on those scales myself.

Q. 13. During that time were there produced different designs or modified forms of this type of scale, and if so, will you state what those different designs or modified forms were?

A. When I first went to work there in April, 1894, Mr. Keck, a pattern-maker, was making patterns for a new design of base and outside cylinder ends for this scale. The base, instead of being what is known to the pattern making trade as the bobnetting design, was worked out in a more pleasing appearance which could be plated much more easily.

Q. 14. Is the base of the exhibit scale of this bobnetting design?

A. Yes, sir; it is.

Q. 15. Now, during the period that you have mentioned, was this general computing arrangement of the exhibit scale

carried into any other types of scales which were intended for similar uses?

A. The same general principle of using a computing cylinder was carried out later in an even-balanced scale, but the cylinder was carried by and made part of the lever itself.

Q. 16. Do you remember how long this was after the time you entered the employ of the Dayton Company?

A. Possibly a matter of two years.

Q. 17. In order that the court may know what is meant by the term "even-balanced," defining the type of weighing or computing scale, will you please explain briefly?

A. A scale having a lever the fulcrum of which is central between the pivots at equal distance at either end; supported on these load pivots at either end is a weighing pan so that any weight or commodity placed on one pan would have to be perfectly balanced by an equal commodity in the other pan before the scale lever would show a movement or oscillation.

Q. 18. Do you recall whether during the period of time mentioned by you, to wit, the years 1894, 1895 and 1896, the Dayton Company manufactured scales with the computing cylinder carried upon the beam, which scales were not of the even-balance type

A. Not to my knowledge.

Q. 19. Do you recall whether during the period mentioned in my last question there were any different materials employed for the computing cylinder than such as you have mentioned when describing the makeup of computing cylinder that was in vogue when you entered the employ of the Dayton Company?

A. There was no change in the material which went to make up the ends upon which the cylinder mounted until scales were made which had the computing cylinder rigidly fastened to the weighing beam.

Q. 20. Well, what change of materials was then made?

A. They were changed from cast iron ends, which were not machined, to sheet brass spinnings which would run with a greater degree of accuracy to their center.

Q. 21. Prior to the time when you yourself worked upon these cylinder computing scales in the factory of the Dayton Company, had your duties been such that the regular manufacture of said cylinder scales in the factory of the Dayton Company came under your notice?

A. The manufacture of these scales was carried on in the same room in which I worked.

Q. 22. The company you have referred to as the Dayton Company is The Computing Scale Company, which is the complainant in this case, is it?

A. Yes, sir.

Q. 23. What is the nature of your present occupation as an employee of the Toledo Computing Scale Company?

A. I have charge of one of the invention departments.

Q. 24. What has been the character of work you have had to do as an employee of the Toledo Computing Scale Company since you went to work for it, and in this connection please state when you did enter the employ of the Toledo Computing Scale Company

A. Went to work for the Toledo Company July 23, 1906. The first six months I was with them I had charge of their assembling room. The balance of the time I have been there in the capacity of an inventor bringing out and developing new ideas in scales.

Q. 25. Are you thoroughly familiar with the cylinder computing scale of the Toledo Company, a specimen of which is in evidence as "Complainant's Exhibit Defendant's Scale"?

A. Yes, sir; I perfected this cylinder scale.

Q. 26. Is it an accurately weighing and computing scale?

A. I consider it the most accurate computing scale of its kind made.

Q. 27. To what do you attribute its great accuracy?

A. To its construction and the nicety with which all bearings are made.

Direct examination closed.

Cross-Examination by Mr. Scott.

XQ. 28. What was your occupation, Mr. Hapgood, between the time you left The Computing Scale Company at Dayton and the time you entered the employ of the Toledo Computing Scale Company?

A. With the National Cash Register Company all the time. On reflection, I think it is 1905 I went with the Toledo Computing Scale Company instead of 1906.

XQ. 29. What was the character of the work you did in perfecting the cylinder scale for the Toledo Company?

A. In producing a perfect working weighing device which could be manufactured and put out on the market.

XQ. 30. Did you introduce any changes in the design of the scale?

A. Very materially.

XQ. 31. In what particulars?

A. Made machine joints on all points where the different parts of the scale fastened together, which would stop any change of character of the parts, and produced a pinion which was absolutely accurate in the cutting of its teeth and locating such pinion absolutely central to the cylinder shaft of the computing drum.

XQ. 32. What was your meaning in using the expression "stop any change of character of the parts"?

A. I mean this: I mean the two pieces of metal if they were fastened together in the rough would be liable to change their character, and this could be stoped if those two pieces were machined at a point where they contacted each other.

XQ. 33. Do you remember the time of year it was when you entered the employ of the Toledo Computing Scale Company?

A. Yes, sir, very distinctly, because I came to Toledo on my birthday.

XQ. 34. What was the month and day?

A. July 23rd.

XQ. 35. Then it would be about the beginning of the year 1906 that you started to perfect the cylinder scale for the Toledo Company?

A. Yes, sir.

XQ. 36. At the time you entered the employ of the Toledo Company in July, 1905, had their cylinder scale been placed upon the market?

A. No, sir.

XQ. 37. Was it placed upon the market before you had perfected it or afterwards?

A. Afterwards.

XQ. 38. And how long do you think it was after you started to perfect this scale before it was put upon the market?

A. I think it was a matter of about six or eight weeks.

XQ. 39. When you entered upon this work had the necessary patterns, dies, and so forth, been made for the manufacture of the cylinder scale?

A. Yes, sir; they had.

XQ. 40. And you adopted these same patterns and dies, except to the extent you have explained?

A. With some slight changes.

XQ. 41. How was the cylinder constructed, that is, of what material, in the Toledo cylinder scale when you started work upon it?

A. It was made of sheet steel, that is, sheet steel cylinder ends or chart spiders.

XQ. 42. Have you any recollection as to about how thick the sheet steel was that was used?

A. I don't know as I can recall the exact thickness.

XQ. 43. Can you approximately state the thickness?

A. Not within a limit of five or ten thousandth.

XQ. 45. Has any change since been made in the construction of the spiders for supporting the ends of the cylinder?

A. On one of the larger scales there has.

XQ. 46. And what is this change?

A. It was changed from steel to aluminum.

XQ. 47. Of what material was the cylindrical surface of the chart made in the cylinder scales of the Toledo Company when you started work upon that scale?

A. It was made of paper.

XQ. 48. How did that paper compare in thickness with the cylindrical part of the chart of "Defendant's Exhibit Dayton Cylinder Scale"?

A. The paper upon which this chart is printed I would say is about the same thickness as the paper the Toledo Company used in making up their cylinder scale chart.

XQ. 49. In your answer do you refer simply to the outer layer of paper upon the cylinder of "Defendant's Exhibit Dayton Cylinder Scale," or do you refer to that outer paper including the backing to which it is pasted?

A. I refer to the outer paper upon which the printing is placed.

XQ. 50. Then, as I understand you, the shell of the cylinder of the Toledo cylinder scale was of about the thickness that the shell of "Defendant's Exhibit Dayton Cylinder Scale" would be if the paper backing were removed from the inside of the single sheet upon which the printing appears; is that correct?

A. Yes, sir.

XQ. 51. Is paper of similar thickness still used for the shells of the cylinders of Toledo cylinder scales?

A. Yes, sir.

XQ. 52. Was the Toledo cylinder scale an operative structure for the purposes intended when you entered the employ of that company?

A. Yes, sir.

XQ. 53. At the time you entered the employ of the Toledo Computing Scale Company, did you have any knowledge of a cylinder manufactured by the Dayton Computing Scale Company? I refer to a cylinder scale in which the cylinder is automatically revolved by the weight of the commodity placed upon the platform or pan of the scale?

A. Yes, sir; I had.

XQ. 54. When did you first learn of that scale?

A. In May, 1902. I remember this date distinctly because I had just returned from England for the Dayton Company.

XQ. 55. That was a platform cylinder scale, was it not?

A. Yes, sir.

XQ. 56. Did you know of a suspended scale of this type prior to that time?

A. Yes, sir.

XQ. 57. When you entered the employ of the Toledo Computing Scale Company, did you see any of the automatically revolving scales of The Computing Scale Company of Dayton, that is, did you see them at the Toledo Company's plant?

A. I did; yes, sir.

XQ. 58. How did these scales happen to be at the Toledo Company's plant?

A. They were taken in exchange in part payment for Toledos sold.

XQ. 59. What was done with these scales?

A. They were broken up, and the parts sold for scrap that could be utilized.

XQ. 60. Are all of the Dayton Computing Scale Company scales so traded in broken up for scrap by the Toledo Company?

A. Not at the present time.

XQ. 61. What do they do with them at the present time?

Mr. Davis: This line of examination is objected to as clearly immaterial, irrelevant and incompetent.

A. They are rebuilt and sold as second-hand Dayton scales.

XQ. 62. How many of the Toledo cylinder scales did you see when you entered the employ of the Toledo Comput-

ing Scale Company, that is, was it a single model machine or were there a number of them?

A. There were a number of them.

XQ. 63. Did any one of them appear to be a hand-made machine as distinguished from one built from patterns and dies, and so forth?

A. All the machines that I saw were made from patterns.

XQ. 64. What kind of computations were on the cylinders of those first scales you saw, that is, were the price graduations in accordance with the number of cents per pound in the price, or were the price graduations placed opposite the weight graduations, that is, showing the price of each ounce or two ounces?

Mr. Davis: Objected to as immaterial and irrelevant.

A. The values on these scales were placed in their right relation to the indicating line or zero line of the chart.

XQ. 65. Do you know of two systems of marking the computations upon cylindrical charts?

A. Yes, sir.

XQ. 66. Please state briefly what the systems are, and which system appeared upon the cylinders of the Toledo scales which had been built when you entered the employ of the Toledo Company.

Objection repeated.

A. First, there is a dishonest system of placing the values on a computing chart. In this system the values are placed directly opposite the one-ounce or two-ounce graduations of the scale, irrespective of their price per pound. In the second, or honest system of placing the values on a computing chart, the space allotted to a pound at say, for example, 7 cents per pound, in the 7-cent per pound column this space would be divided into seven equal parts, each one representing one-seventh of a pound, or 1 cent in value at that price. This latter system was on the scales which I saw at the Toledo factory when I went to work there.

XQ. 67. In this latter system in which the part of a column corresponding to one pound is divided into seven equal parts adapted for readings at 7 cents per pound, would there be any computation or value indication directly opposite the half-pound weight graduation?

Objection repeated.

A. No, sir; there were not.

XQ. 68. What led to your leaving the employ of The Computing Scale Company of Dayton?

A. Because I got tired of working for a firm that didn't appreciate what I tried to do for them.

XQ. 69. You have referred to an even-balanced scale in which a cylinder was carried by and made part of the lever itself. In this scale how was the cylinder rotated?

A. By hand operation.

XQ. 70. How were the sheet steel end pieces of the revolving cylinder of the Toledo scale formed?

A. Formed on a punch press.

XQ. 71. What was their general construction, a series of arms radiating from the center like spokes?

A. Four arms or spokes radiating from the center to a rim.

XQ. 72. And how was the paper chart fastened to the end pieces?

A. It was stapled on at intervals of two or three inches on its circumference to the chart spiders.

XQ. 73. Is this method of fastening the chart to the spiders still followed?

A. I believe it is.

Cross-examination closed.

Redirect Examination by Mr. Davis.

RDQ. 74. To what in particular do you attribute such accuracy as the Dayton platform cylinder scale has in weighing?

A. To the sensitiveness of bearings on which the chart revolves.

RDQ. 75. What function does lightness of cylinder subserve in an automatic scale such as either the Dayton platform cylinder scale or the Toledo platform cylinder scale?

A. Why, it makes less strain on the teeth of the rack and pinion when starting or stopping the scale quickly.

RDQ. 76. Does the employment of a pendulum as the weighing medium in the Toledo platform cylinder scale make for accuracy in weighing as contrasted with other kinds of weighing media?

A. Yes, sir; it does.

RDQ. 77. Is paper of the thickness employed in the Toledo scale for the shell of the computing cylinder sufficiently self-sustaining for practical purposes, or does the paper employed for such purpose in said scale require treatment in order to stiffen it so that it may become and remain smooth

and regular in its cylindrical form where it spans the space between supporting disks or spiders

A. This paper has to be treated inside and outside with two coats of a certain preparation which not only stiffens and toughens the paper, but excludes all moisture, which keeps the chart from changing character when subjected to dampness.

RDQ. 78. Do you recall whether the Dayton Company in adapting the light form of computing cylinder to the platform lever type of scale found it necessary to work out means of securing accuracy in weighing?

By Mr. Scott: Objected to as irrelevant.

A. Yes, sir; they did.

RDQ. 79. What means were employed to attain accuracy in weighing?

A. I saw the first platform cylinder scale which was ever made in the Dayton factory. They asked me to come down to the experimental room to test this scale, which I did. This scale was made up of the same style of drum as was used in their drum hanging scale, but was mounted in connection with a platform and lever. I found that in testing this scale for friction that it could be made to stick either side of a proper line to which it should come of nearly one-half ounce either way. In order to overcome the difficulty which they encountered in this scale they had to entirely remodel the bearings into which the cylinder shaft revolved and substitute ball bearings for a plain bronze bushing which was theretofore used.

RDQ. 80. What was the makeup of the cylinder in that scale?

A. It had the aluminum chart spiders upon which the drum of paper was wound.

Redirect examination closed.

Recross Examination by Mr. Scott.

RXQ. 81. Do you remember when it was that you were called upon to test the Dayton platform cylinder scale which you referred to?

A. Some time in May, 1902.

RXQ. 82. Were the scales upon the market at that time, that is, were the platform cylinder scales upon the market?

A. I believe not.

RXQ. 83. Are you sure whether they were or not?

A. I do not think these scales were on the market at that time, that is, the platform cylinder scales.

RXQ. 84. What was this platform cylinder scale you tested, a hand-made scale, or one made from patterns, dies and so forth?

A. It was made from patterns.

CLARENCE H. HAPGOOD.

Adjourned subject to further notice.

State of Ohio, } ss.
Lucas County, }

I, SOLON T. KLOTZ, Notary Public, hereby certify that the above witnesses, John H. Milburn, John H. Culmer and Clarence H. Hapgood, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their depositions were reduced to writing by Mr. W. J. Billingslea in the presence of the said witnesses respectively, and when completed read over to said witnesses respectively, and subscribed by them in my presence and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to the annexed notice, at the office of Owen & Owen, at 922 Nicholas Building, Toledo, Ohio, beginning on the 29th day of December, 1911, and continuing from day to day as set forth; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal, this sixth day of January, 1912.

SOLON T. KLOTZ,
Notary Public, Lucas County, Ohio.

IN THE UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

The Computing Scale Company
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024.

NOTICE.

To Messrs. Sheridan, Wilkinson, Scott & Richmond, Marquette Bldg., Chicago, Ill.

Gentlemen:—

You are hereby notified that we shall resume the taking of depositions on behalf of the defendant in the above-entitled cause, under the Sixty-seventh Equity Rule as amended, and in accordance with the stipulation hereinbefore entered into between the parties to the above cause by their counsel, before Kate S. Holmes, a Notary Public for Cook County, Illinois, at our office 1901 McCormick Building, Chicago, Illinois, beginning at 2 o'clock in the afternoon on Wednesday, January 10th, 1911. You are invited to attend.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

Chicago, January 8, 1912.

Service of above notice acknowledged this 9th day of January, 1912.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Solicitors for Complainant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

The Computing Scale Company
vs.
Toledo Computing Scale Company.
} In Equity. No. 30,024.

Depositions taken on behalf of the defendant in the above-entitled cause, under the Sixty-seventh Equity Rule as amended, and pursuant to stipulation between the parties by their counsel, before Kate S. Holmes, a Notary Public for Cook County, Illinois, at the office of Rector, Hibben, Davis & Macauley, 1901 McCormick Building, Chicago, Illinois, beginning at 2 o'clock P. M., on Wednesday, January 10, 1912.

Present: T. H. Sheridan, Esq., for complainant; and F. P. Davis, Esq., for defendant.

KEMPSTER B. MILLER, a witness called on behalf of defendant, having been first duly sworn, testified as follows in answer to questions put by Mr. Davis:

Q. 1. Please state your name, age, residence and occupation.

A. Kempster B. Miller; agee 41; residence, Chicago, Illinois; and occupation, consulting engineer.

Q. 2. Please briefly review your education and experiences which qualify you to pursue the occupation stated in your last answer.

A. I am a graduate of Cornell University in the course of mechanical engineering. Before entering Cornell I had given much study to mechanical and physical matters and I believe that any natural aptitude which I may have is in that direction.

After leaving Cornell I entered the United States Patent Office as an Assistant Examiner and for about three years was employed in making examinations into the novelty and patentability of the devices submitted by applicants for patenting. This work involved the study of the devices submitted so as to obtain a thorough understanding of their nature, and then a comparison of these devices with the prior art as disclosed by the patents of the United States

and foreign countries and by the literature pertaining to the subject. I mention this experience as being particularly pertinent in answer to this question concerning my qualifications as an expert in patent cases.

I left the Patent Office about sixteen years ago to accept a position with the Westinghouse Electric and Manufacturing Company, a large manufacturing company in Pittsburgh, Pennsylvania, and after a short term of service there I came to Chicago and for about eight years was engaged in the manufacturing business in this city. My experience in this work was of a varied nature and was one which continually brought upon me the necessity of solving mechanical problems, some of them of a very complex nature. For about six years of this period I was engineer of the Kellogg Switchboard and Supply Company, a large manufacturing company manufacturing a complex line of mechanical and electrical apparatus, and during a portion of this period I was the active superintendent of the factory which employed at times in the neighborhood of one thousand men.

For about eight years past I have been practicing as a consulting engineer under the firm name of McMeen & Miller. Our work has included a large amount of patent work, as solicitors of patents, as experts in patent causes and as advisers on complex mechanical and electrical problems relating to patents.

I am a full member of the American Institute of Electrical Engineers and of the Western Society of Engineers and am the author of a number of books and articles, some of which I believe are considered authoritative.

Q. 3. Please state in what manner you have informed yourself with regard to the subject-matter in controversy in this cause and in what manner you have specially equipped yourself to testify here in your capacity of engineer, mechanical expert or patent expert.

A. After reading, and studying with care, the various papers relating to this case and examining the exhibit scales filed in this case I visited the factory of the Toledo Computing Scale Company, at Toledo, Ohio, in order to familiarize myself with the methods employed in the manufacture of such scales, and to study not only the completed scales but the problems which arise in their manufacture. I have also made rather careful tests of such scales and have endeavored in every way possible to make myself familiar with the practical phases of their manufacture and use.

Q. 4. Please state your understanding of the disclosure in patent in suit No. 597,300.

A. The patent to which you refer discloses a scale which has for its purpose the indication not only of the weight of an article but also the price that is to be charged for it at a given price per pound. The disclosure is, therefore, of a device of the class commonly referred to as "Computing Scales."

The article to be weighed is placed in a platter suspended from the hook 16 shown in Figs. 1 and 3 of the drawing, and the downward pull on this hook is transmitted through a system of cross rods and draft bars to the lower ends of the coiled springs 10. These springs are correspondingly elongated by this downward pull and the amount of this elongation is determined, for a given set of springs, by the weight on the platter. The downward movement caused by the weight on the platter is also transmitted to a pair of rack-bars 9, and the racks associated with these bars by their engagement with two pinions 12 cause a rotation of the shaft on which the two pinions are carried. On this shaft is carried the scale cylinder or drum, as it is called in the patent, the arrangement being such that any rotation of the pinions and shaft will cause a corresponding rotation of the cylinder, the cylinder and thee pinions being rigidly attached to the shaft. From this construction it follows that the amount of downward movement of the rack-bars due to a weigh upon the platter, will determine the amount of angular movement or rotation of the cylinder.

The face of the cylinder is graduated, as best shown in Fig. 4, in pounds and ounces, these graduations being so spaced that they will always be a measure of the weight put on the scale platter; that is, a weight of one pound on the scale platter will move the cylinder a certain amount, and the amount of this movement as measured on the surface of the cylinder, will be the distance from zero to one on the scale. As the amount of movement of the cylinder is supposed to be directly proportional to the amount of weight in the platter it follows that the graduation of the scale representing pounds and ounces will be one of uniform divisions.

It will be noted from Fig. 4 that there are two sets of markings corresponding to pounds on the cylinder, one of these being upside down, with respect to the other; and that between these two rows of figures representing pounds there

is a common row of smaller scale divisions and figures representing ounces. This duplication of the columns of figures representing pounds is for the purpose of permitting a reading of the scale from both front and rear—that is, so that both the buyer and the seller may see the figures representing the weight. Obviously any set of figures on the rotating drum that would be right side up on one side of the drum, would be wrong side up if the drum were rotated to bring them around to the opposite side. It is for the purpose of enabling the observer on either side of the scale to see the figures right side up that these two rows of pound indications in reversed directions are placed on the drum.

In order that the person on the front side of the scale may not be confused by the upside down set of figures intended to be read only from the other side of the scale, the window or opening in the casing which encloses the drum is made in such position as to show only the figures that are intended to be read from that side of the scale; and likewise the window on the rear side of the scale is placed opposite the other row of figures so as to exclude from view on that side the row of figures which are intended to be read only from the front side. These windows in the front and rear sides of the casing, respectively, are shown in Figs. 1 and 2 of the patent, and it is to be noted that they are both wide enough to permit the ounce markings which are common to both the rows of pounds figures to be seen.

Both the front and rear windows or openings are covered with glass or other transparent material, and on these pieces of glass are placed pointers or arrows as shown at 26 in Figs. 1 and 2, these being so located as to register with the zero mark on the respective pound and ounce columns when there is no weight on the platter.

In addition to the pound and ounce markings on the cylinder there are a number of columns of figures parallel with the pound and ounce columns, each of these latter columns corresponding to a certain price per pound of the commodity to be weighed. The figures in a given price column are arranged about the circumference of the cylinder in such way that the figure opposite a given weight in the pounds and ounce column will always represent the amount to be charged for that weight of the commodity at the price represented by that column. In order that the price columns may be visible to the person at the front of the scales a horizontal slot 25 extends across the opening of the casing which encloses the

cylinder. This permits the person who is weighing the commodity to view the price figures corresponding to a given weight of commodity, and his choice of these price figures is determined by the row of figures on the casing adjacent to the slot which represent various prices per pound. As no such slot is provided on the rear of the casing the price columns of the cylinder are concealed from the person on that side of the scale.

Q. 5. Among the papers you referred to as having been examined and studied by you in your preparation for giving testimony in this case, was there a copy of the file of the application for said patent in suit, 597,300?

A. There was.

Mr. Davis: A certified copy of file-wrapper and contents of patent in suit 597,300, is here offered in evidence, and the Examiner is requested to mark the same "Defendant's Exhibit File-Wrapper Patent in suit 597,300."

Q. 6. Please take up that copy of file-wrapper and contents just offered in evidence, and review the same, having reference more particularly to the subject-matter of the single claim of that patent which had been put in issue, to-wit, claim 2.

A. This copy of the file-wrapper and contents shows that the application was filed July 30, 1897. As originally filed the case contained thirteen claims. Of these thirteen original claims, claims 9 to 13, inclusive, were allowed as filed and form claims 7 to 11, inclusive, of the issued patent. These five claims are the only ones of the original thirteen that survive, and all of them relate in general to the combination of draft-bars, rack-bars, and equalizing members, by which the pull on the hook due to the weight of the article being weighed is transmitted to the springs and pinions. These claims have nothing to do with the combination of claim 2 involved in this suit, and may therefore be passed without further notice.

Claims 1 to 8, inclusive, as originally filed, all related to the drum and its markings, and some of them also to the openings in the casing enclosing the drum through which these markings might be viewed.

Original claim 8 covered merely a drum having columns of figures to indicate amounts of money, and another column to indicate weights, this weight column having large figures to represent pounds, and small ones to represent ounces. This claim was rejected on the first action by the Office on the

patent to Swihart 535,965, March 19, 1985, and was cancelled by the first amendment.

Claim 6 was drawn on the casing alone, with its windows and markings, and was rejected by the first Office action on the patent to Smith, reissue 11,536, in conjunction with the Swihart patent. It was likewise cancelled by the first amendment.

Of the remaining original claims, 1, 2, 3, 4, 5, and 7, 7 was the broadest, and read as follows:

"7. The drum having two columns of figures to indicate pounds and ounces, said columns of figures reading in opposite directions substantially as described, for the purpose specified."

Claim 1 was for the same sort of drum as specified in claim 7, but included also the casing, with the front and rear openings, through which to view the columns of figures on the drum. Claim 2 was of similar nature to claim 1, but included also the price columns on the drum, and the slot through which the prices, as well as the weights could be seen.

Claim 3 was almost like claim 1, but included the additional limitation that the figures representing pounds were to be relatively large and those representing ounces relatively small.

On the first Office action these four claims, Nos. 1, 2, 3 and 7, were rejected on Smith's own prior patent, reissue 11,536, taken in connection with the patent to Phelps 438,753.

It is to be noted that Smith's prior patent showed a computing scale of the drum or cylinder type, so arranged that a weight placed on the platter would cause the drum to revolve to such an extent as to cause figures representing pounds and ounces on the drum to be displayed through a window so that the operator could determine the weight. This drum also carried columns of figures representing price of the corresponding weights of commodities at various prices per pound, and these were also displayed through an opening to show the operator the price to be charged for any corresponding weight. This prior patent to Smith shows the same kind of a scale, operating in the same way, to indicate pounds and ounces, and also the price to be charged, but it does not show the means for indicating to the purchaser the weight of the commodity that he has purchased.

The patent to Phelps, referred to by the Patent Office in its rejection of claims 1, 2, 3 and 7, is also for a computing

scale, but instead of employing a rotating cylinder upon which the prices and weights are marked, it employs a flat stationary dial, carrying figures representing prices on one side. It also has a dial showing weights on the same side as the price figures, so that both prices and weights are within view of the operator. On the other side of the scale there is a dial carrying weight figures only, and these weight figures read in the opposite direction from the weight figures on the other side. A movable pointer travels over the dial on the front of the scale, so as to indicate to the operator both weights and prices, and an extension to this pointer indicates on the back of the scale the corresponding weight to the customer. This Phelps patent, therefore, shows a computing scale arranged for both front and back reading, and adapted to show to the operator indication of both weight and price and to the customer indication of weight alone.

The Patent Office held with respect to original claims 1, 2, 3 and 7 that there was no invention in marking two rows of weights indicating numbers on the drum shown in the computing scale of the first Smith patent, and displaying these two rows through opposite sides of the casing, in view of the fact that the Phelps patent showed two rows of weight indicating numbers reading in reverse directions, so as to be viewed from opposite sides of the scale.

Original claims 4 and 5 of the application as filed were for combinations of the rotating drum carrying the columns of figures for indicating prices and weights, together with the windows for showing these figures through the casing, and each of these two claims also included an additional row of figures above the opening or slot in the front of the casing, through which prices were to be noted, this latter row of figures indicating the amounts to be charged for a predetermined number of pounds of merchandise. Claim 5 differs from claim 4 in that this predetermined number in claim 5 is placed at twenty.

These two claims 4 and 5 were rejected by the Office on the first action on the ground that they covered merely an aggregation of what is shown in the patents to Smith, Phelps and Swihart, already referred to.

In the first amendment dated October 27, 1897, applicant's attorney cancelled claims 6 and 8, as already stated, and amended claims 1, 2, 3, 4, 5 and 7 in the hope of making them avoid the references cited. This amendment consisted in limiting each of the claims 1, 2, 3, 4 and 5 by insertion of the

word "independent," so as to refer to the two columns showing pounds and ounces; and further, in modifying each of these claims by specifying that each of the openings, that is, the openings on the front and rear of the casing, were to be so placed as to permit the reading of one of the columns of figures only. Claim 7 was modified by the addition of the openings in the casing, which were specified to be at different distances from either end of the casing.

Notwithstanding these modifications the Office in its next action, dated November 10, 1897, rejected all of the six amended claims. The rejection this time was on Smith's earlier or reissue patent, in connection with the patent to Pottin, No. 312,014, dated February 10, 1885.

This Pottin patent is for a cash register, and its pertinency will be appreciated when it is noted that it is designed to show to the purchaser on one sde of the register the same amount that is shown to the operator on the other side of the register.

Referring to Fig. 1 of the Pottin patent, there is seen a cylinder B within the cash register casing, and the face of this cylinder is adapted to be viewed from the rear through the opening or window *a*, and from the front through the opening or window *c*. In Fig. 4 another view of these cylinders is shown, and it is seen that each carries two columns of figures, reading in reverse directions, the figures of one column being upside down, with respect to those of the other column on the same cylinder. The two openings in the front and rear of the casing are so spaced that the figures of one column on a cylinder will appear right side up through one of the windows, and the figures of the other column will appear right side up through the other of the windows. Each window is so placed as to conceal the column of figures which is not intended to be viewed through it.

In rejecting claims 1 to 6, inclusive, as amended, the Patent Office held that it did not involve invention to arrange the indicating numerals for pounds and ounces on the drum of the Smith patent in the same way that the indicating numerals were shown on the Pottin patent.

Adjourned to 10 o'clock A. M., January 11, 1912.

Janary 11, 1912, 10 o'clock A. M.

Met pursuant to adjournment. Present as before.

Direct examination of KEMPSTER B. MILLER resumed.

The witness continues his answer to Q. 6.

In answer to this second rejection by the Patent Office the applicant's attorney submitted an amendment dated November 26, 1897, cancelling all of the rejected claims, that is, claims 1 to 6, inclusive, and submitted in lieu thereof six new claims of a very much more specific nature. It is to be noted that in thus cancelling these claims applicant showed his acquiescence in the pertinency of the Pottin patent as showing front and back indications of markings on the surface of the cylinder, the markings being in two rows in inverse order, and the arrangement being such that one column of figures showed right side up through the front opening of the casing, and the other column of figures right side up through the opening in the rear side of the casing. He also showed acquiescence in the statement by the Examiner that there was no invention in providing indicating numerals for pounds and ounces in inverse rows on the cylinder of the earlier Smith patent, in view of this similar arrangement of numerals on the cylinders of the Pottin patent for a cash register.

In his amendment of November 26, 1897, applicant submitted six new claims. Of these 1 and 2 were rejected by the Patent Office, while 3, 4, 5 and 6 were allowed and constitute claims 3, 4, 5 and 6 in the patent as issued.

As claim 2 submitted in this amendment embodies a part of claim 2 of the issued patent, I will quote it on the record, in order that the further amendment necessary to make it allowable may be understood. As submitted in the amendment of November 26, 1897, claim 2 reads as follows:

"In a scale of the character described, the combination with a casing having openings in opposite sides, but not opposite each other, of a revoluble drum provided with a series of columns of figures representing dollars and cents and two independent columns of figures representing weights in pounds and ounces, one column of the latter being arranged to be read from the same side of the casing as the figures representing dollars and cents, and the other column of weight figures being arranged to be read solely through

the opening in the opposite side of the casing, the figures representing dollars and cents not being visible from said opposite side."

This claim as submitted in this amendment is exactly the same language as is employed in the first sixteen lines of claim 2 of the patent. It covers the revolving scale drum, having columns of figures on it representing prices, and two columns of figures representing weights so arranged that one of the columns of weight figures could be read only from the same side of the casing through which the price figures were readable, and the other column of weight figures being readable only from the opposite side of the casing.

In the next Office action dated December 2, 1897, this claim was rejected on the prior reissue patent of Smith, in connection with the Pottin cash register patent, for the reason of record.

Claim 1 of the amendment of November 26, 1897, included also the limitation that the openings in the front and rear of the casing were covered with transparent material having stationary pointers thereon. Concerning this the Examiner, in rejecting claim 1, stated, "it is not invention to place transparent material over the reading openings. This is old as shown in Patent 589,602 to Hoyt September 7, 1897." This patent to Hoyt shows a computing scale of the dial type, the dial having barkings representing prices, and also other markings representing pounds and ounces, the openings through which prices are read are covered with glass, as shown at C in the small detail of Fig. 2. This glass in this patent not only serves to close the opening, but also serves as a lens to magnify the size of the figure seen through it.

In response to this rejection of claims 1 and 2 by the Examiner applicant acquiesced in the position taken by the Examiner and amended both the rejected claims. The amendment to claim 2 consisted in the addition of the following matter:

"the openings in the opposite sides of the casing being covered with transparent material having stationary pointers thereon adapted to correspond with each other in their indications of figures so that when the pointer on one side indicates one figure in one column, the other pointer on the other side will indicate exactly the same figure in the other column."

With this limitation specifically reciting the covering of

the front and back opening with glass or transparent material, and the placing of stationary points thereon so as to correspond in front and back indication the Examiner allowed the claim and the case was passed to issue.

Summarizing this answer with particular reference to the history of claim 2—the claim involved in this suit—it is to be noted that applicant's attorney acquiesced in the position taken by the Examiner that there was no patentable novelty in the combination recited in the first sixteen lines of the claim in view of the Smith reissue patent and the Pottin patent. In other words, he acquiesced in the proposition that there was no invention involved in taking the inversely arranged double row of figures on the cylinder of the Pottin patent, with windows for front and back reading, and applying them to the cylinder scale of the Smith reissue patent with its rows of price and weight figures. Smith's attorneys admitted that the combination recited in the first sixteen lines of claim 2 of the patent was devoid of patentable novelty, in view of the earlier Smith and Pottin patents, and was content to take a claim which was specifically limited to the covering of the openings, with transparent material having stationary pointers thereon.

In reviewing this claim in suit, I wish to call attention to the fact that it is, to a certain extent, misdescriptive of this disclosure in the specification and drawing. The claim recites:

"two independent columns of figures representing weights in pounds and ounces."

The patent does show two independent columns of figures representing pounds, as clearly indicated in Fig. 4, and also in Figs. 1 and 2, but there is but one column of figures representing ounces, that being common to the two columns of figures representing pounds and lying between those two columns. While the front and back openings in the casing disclose to view different pounds columns of figures, they disclose the same ounce figures with the result that the figures representing ounces will be upside down as seen from the back of the scale, as clearly disclosed in Fig. 2, and right side up as seen from the front of the scale, as clearly shown in Fig. 1.

It is perfectly clear from a study of the history of the file-wrapper and contents of this case that the provision of a cylinder scale of the type shown in the prior Smith reissue patent with the addition of another inversely arranged

column of weight figures, and with front and back openings for permitting the reading of weights from each side of the scale, as covered by the first sixteen lines of claim 2, covers no patentable novelty, and that the applicant's attorney acquiesced in this view, which was the view taken by the Examiner. It is also obvious that any novelty in this claim must be looked for in the matter added to it in the amendment of December 3, 1897, and included in the last nine lines of the claim, which relates to the transparent material covering the openings, with stationary pointers thereon.

Mr. Davis: Under the stipulation heretofore entered into between the parties, regular printed Patent Office copies of the several prior patents mentioned in the witness' above answer, are here offered in evidence, and the Examiner is requested to mark the same as follows:

"Defendant's Exhibit Swihart Patent 535,965."

"Defendant's Exhibit Smith Reissue Patent 11,536."

"Defendant's Exhibit Phelps Patent 438,753."

"Defendant's Exhibit Pottin Patent 312,014."

"Defendant's Exhibit Hoyt Patent 589,602."

Q. 7. Having reference more especially to the matter of front and back reading, with inverted figures and sight openings in opposite sides of an enclosing casing, please refer, if you can do so, to any other examples at hand of prior disclosures in addition to such as that afforded by the Pottin patent referred to by you in your last answer as having been cited by the Patent Office Examiner with reference to the feature in question.

A. I will first call attention to the patent to Chase, 212,789, granted March 4, 1879. This is an indicator for displaying train bulletins in railway stations and for similar purposes. It consists in a number of cylinders, the surfaces of which are inscribed with proper insignia, these cylinders being enclosed in a casing having openings on opposite sides (front and rear). These openings being arranged out of alignment with each other, so that the front opening will disclose one set of cylinder markings, while the rear opening will disclose another set. One set of cylinder markings is arranged upside down, with respect to the other, so that those disclosed through the front side opening will be right side up from that point of view, as will be those disclosed through the other opening. The arrangement of these cylinders is best shown in Fig. 4, where six cylinders are disclosed. Of these the two end cylinders A and F are rigidly

attached to the shaft B, so as to turn together, the two cylinders B and E are rigidly attached to the sleeve *c*, surrounding the shaft so as to permit their turning together independently of the cylinders A and F. Likewise the cylinders C and D are secured to another sleeve d^6 surrounding a sleeve *c*, permitting these two latter cylinders to turn together independently of any of the others. There is, therefore, a number of cylinders connected together in pairs by an arrangement of sleeves, commonly referred to as "nested sleeves." The three narrow cylinders, D, E and F, have markings which are visible only to the ticket seller, within the ticket office. The three cylinders, A, B, and C, have similar markings, visible only through the opening in the other side of the casing, which is displayed outside of the ticket office, as in the depot waiting room. The markings on the two sets of cylinders correspond to each other, but are arranged in inverse order and upside down with respect to each other, so that the markings visible through each of the openings may always be right side up.

The two cylinders C and D, form practically a single cylinder, since they are rigidly secured together, always turn together, and their cylindrical surfaces are contiguous. The surface of the cylinder D will be visible only through the opening of the casing on the ticket seller's side, and that of the cylinder C only through the opening on the opposite side. If, therefore, the ticket seller moves the cylinder D so as to bring the word "Late" into view through his opening, he will know that the corresponding word "Late" will be displayed on the cylinder C, through the opening in view of the public. Obviously, since the two words 'Late" are to be disclosed right side up through each of the openings they must be reversed with respect to each other on the cylinder faces; such reversal is clearly indicated in Fig. 2.

Considering the cylinders C and D as one cylinder, as they are in effect, this patent to Chase affords an excellent early example of a disclosure of a cylinder having two columns of corresponding markings arranged in inverse order, one column being visible through a sight opening, one on each side of the case, and the other column being visible through a sight opening on the other side of the case, and the figures in each column always appearing right side up through their respective openings.

The patent to Patterson, No. 383,006, May 15, 1888, is, like the patent to Pottin, for a cash register. This patent

has a number of cylindrical surfaces, referred to as "tablets" in the patent specification, which surfaces bear numerals adapted to be read from both the front and the back of the machine. They are enclosed in a cylindrical casing shown in Figs. 1 and 2, and in this casing are openings B and C, best shown in the sectional view of Fig. 3 on sheet 3. These side openings are, according to the specification, provided with glass coverings. The cylindrical surfaces bearing these numerals are adapted when moved into any position to display one number through the front opening and a corresponding number through the rear opening, the numbers being inversely arranged on the surfaces so as to make them appear right side up for both front and back reading. The purpose of this front and back reading arrangement is the same as that when employed on computing scales, that is, so that the customer on the rear of the device may be able to observe the amount recorded on the front of the device.

The patent to Koch, No. 398,625, February 26, 1889, is another excellent example of an indicating device provided with openings in the front and back of a casing for displaying the same indication to both customer and operator. In this patent the series of wide faced wheels or cylinders shown in Fig. 5, sheet 4, are arranged in the upper portion of the machine to revolve on a common shaft; each of these wheels bears a series of digits reading from "0" to "9." For the purpose of simplifying the description I will consider the middle pair of wheels or cylinders in Fig. 5. These are the unit wheels 1 and B′, and are adjacent to each other and fitted to a common shaft, so as to revolve together. They form, therefore, in effect, a single cylinder bearing two columns of numerals arranged so that one column is inverted with respect to the other.

The figures of the cylinder B′ are visible only through the sight opening in the front of the casing, as shown in Fig. 1, while those of the cylinder 2 are visible only through the openings in the rear of the casing, as shown in Fig. 2. These two front and rear openings are offset with respect to each other, so as each to be in alignment with the proper column of cylinder figures.

It is to be noted that in this patent the cylinders or indicating wheels are caused to revolve by means of racks and pinions in a manner not unlike that employed in the computing scale of the patent in suit. Concerning the front and

back indicating feature the Koch patent makes this statement, beginning line 23, page 3:

"The figures upon the two sets of indicating-wheels are relatively so adjusted that corresponding figures on each shall appear simultaneously at the front and rear openings through which they are respectively brought to view, and hence the reading of the figures at each opening will be the same."

Recess.

Mr. C. A. Richmond present on behalf of complainant, after recess.

I will next call attention, in answer to your question, to the patent to Lovell, 445,959, February 3, 1891. This is also a cash register patent, and like the others mentioned, it has means for exhibiting the registration through sight openings in the back and front of the casing. Referring to Fig. 1 of this patent, which is a sectional view, the sight openings in the casing are shown at A′ A′, in the inclined front and rear panels of the casing. The indicating numerals are printed on cylindrical surfaces adapted to be revolved within the casing on a central shaft. These cylindrical surfaces are shown in Fig. 4, and a better idea of one of them is given in Fig. 9. Referring to this latter figure it is seen that there are two columns of figures running from "0" to "9"; that these two columns are offset with respect to each other so as not to be in the same line, and that the figures in one of the columns are upside down with respect to the figures in the other column. The openings through which these numerals are displayed through the front and back walls of the casing are correspondingly offset with respect to each other, so that each opening will reveal only that set of figures intended to be seen through it, those figures always being right side up to the observer. Concerning this arrangement the Lovell patent states, beginning at line 51, page 2:

"One arc is at one side of the machine and the other at the other, and one is at the right of the center of the machine and the other at the left, calling the keyboard the front of the machine, and the numerals on one arc are read from top to bottom and on the other from the bottom to the top. When, for example, the numeral 3 is displayed at the units place at the front of the machine, it is also displayed at the units place at the back of the machine, so that to a person standing at the back of the machine and facing the operator, who is at the front of the machine, the numerals will read from left to right."

In this connection it may be well to call attention to the fact that these inventors of front and rear reading cash registers not only had the problem of making the numerals on the cylinders show right side up in both the front and rear sight openings, but also the problem of making the complete number, but up of individual digits, each on a separate cylinder, read properly from left to right through both of the openings.

The patent to Carr, No. 468,329, February 9, 1892, is another example of front and rear indicating cash register. The arrangement of the number wheels in this patent is shown in Fig. 17, and it is seen that the nested sleeve device is resorted to in order to get the numerals displayed at the front and rear of the machine to read each from left to right.

The patent to Fuller, No. 585,467, June 29, 1897, resulted from an application filed February 6, 1891. This also is for a cash register. In this the numerals are arranged on cylinders mounted on a common shaft. This arrangement is best shown in Fig. 3. The marking of the numerals on the cylinders is best shown in Fig. 1. The windows in the front and rear of the casing, through which the numerals are to be observed, are clearly shown in Fig. 2, and again in the horizontal section of Fig. 3, this latter view showing particularly well how the sight openings are offset with respect to each other, so that each will show one column of figures and not show the adjacent column, which is inverted to be read from the other side. Concerning this arrangement of indicating numerals and sight openings the Fuller patent states, beginning line 24, page 1:

"In my present invention the case is provided with openings both at the front and at the rear, and the two sets of indicating wheels are mounted therein and so connected together that the amount indicated appears both at the front and the rear side of the machine with the figures both right side up and reading properly—that is, from left to right."

Referring particularly to the central pair of wheels or cylinders 11 and 14, Fig. 1, the patent states, line 98, page 1, that these two lie together and are simply connected so as to operate as one part. They form, therefore, for all practical purposes, one cylinder with a continuous cylindrical surface. As will be observed, the two columns of numerals on this center pair are upside down with respect to each other, and, as is shown in Fig. 3, the left-hand column of figures is viewed through the front opening of the casing, while the other column of figures is viewed through the rear opening, the cas-

ing in each case serving to obscure from view the other column of figures.

The two center or middle indicating wheels in this Fuller patent, together with the casing and side openings shown, afford an excellent example of a device having a casing with openings in opposite sides, but not opposite each other, through which to observe the numerals on the revolving drum within the casing. It is to be noted that this cylinder, formed by these two wheels, has two independent columns of figures, the figures of one column being inverted with respect to those of the other, and the placing of these columns with respect to the sight openings in the front and rear of the casing being such that those figures which appear right side up from the front of the machine will be seen only through the front sight opening, while the other column, which appears right side up from the rear of the machine, will have its figures visible only through the rear opening.

All of the patents that I have referred to in this answer, namely, the patents of Chase, Patterson, Koch, Lovell, Carr and Fuller, are examples of devices having arrangements for front and back reading, and involving the use in each case of two rows of figures, inverted with respect to each other, placed on cylinders revolving within a casing, the casing having sight openings, front and rear, through each of which only that set of figures which read right side up from that side of the machine are visible. In each case the same numeral is presented simultaneously through the corresponding front and rear openings, so that the person at the back of the machine is given the same indication as the person at the front of the machine. I think I did not call attention to the fact that the case patent, the earliest one of the patents to which I referred in this answer, has numerals, as well as letters and words, as is clearly shown in the drawing.

Mr. Davis: Copies of the several patents discussed in the above answer of the witness are here offered in evidence as showing the prior state of the art, and the Examiner is requested to mark the same as follows:

"Defendant's Exhibit Chase Patent 212,789."

"Defendant's Exhibit Patterson Patent 383,006."

"Defendant's Exhibit Koch Patent 398,625."

"Defendant's Exhibit Lovell Patent 445,959."

"Defendant's Exhibit Carr Patent 468,329."

"Defendant's Exhibit Fuller Patent 585,467."

Mr. Richmond: The foregoing exhibit patents are objected to in so far as they have not been set up in defend-

ant's answer, and also as irrelevant and immaterial to the issues involved in this controversy.

Q. 8. Having reference next to the display through an opening in a surrounding casing of monetary values in addition to weight numerals upon cylinders, please point, if you can, to prior patents other than Smith's prior patent (reissue 11,536) cited by the Patent Office Examiner, which other patents afford disclosures of such a feature.

A. I have already called attention to the fact that the reissue patent to Smith, No. 11,536, mentioned in your present question, was provided with a revolving cylinder, upon which both monetary and weight numerals were placed, and also had a casing enclosing the cylinder, with openings in the casing through which both the weight and the price of the article being weighed could be read. Another example, and a very early one, is found in the patent to Phinney, No. 106,869, August 30, 1870. This is a form of cylinder scale operating on the same principal as that of the patent in suit. It is a spring scale, the article to be weighed being suspended from a hook. The downward pull on the hook causes the spring to elongate and allows a downward movement of the rack G, which, by engagement with the pinion E on the drum shaft, causes the drum to revolve, the amount of angular movement of the drum being proportional to the weight of the article being weighed. The drum is divided longitudinally into columns, in one of which are placed the weight figures and in the others the price figures corresponding to the different weights and to the different prices per pound. All of these figures are viewed through the two openings in the casing, as shown in Fig. 1. This patent shows clearly that cylinder scales of the computing type, showing price as well as weight figures through an opening in the front of the casing were known in the art something over forty years ago.

The patent to Babcock, No. 421,805, February 18, 1890, is another of the same general type, wherein a cylinder carrying both price and weight figures, is operated by a spring,—retracted rack engaging a pinion on the cylinder shaft, and wherein both price and weight figures are viewed through openings in the front of the casing enclosing the cylinder. I call attention to the fact that in this patent to Babcock there is a long slot, or in fact, two slots, arranged horizontally, for viewing the price figures, and that there is a wider opening in the casing through which to view the weight figures, the arrangement in this respect being very similar to that of the patent in suit. It is also to be noted that in this Babcock

patent there is a stationary row of figures L on the casing, just above the slot, this row indicating the various prices per pound. This is exactly the arrangement employed by the patent in suit and by the Phinney patent, in which the scale C represents the price per pound.

Still another patent showing this arrangement is that to Christopher, 588,128, August 17, 1897, filed January 16, 1896. Referring to Fig. 2 of this patent there is a revolving cylinder within the casing, on the surface of which cylinder are numerals for indicating weight and price. These numerals are viewed through a slot or observation opening 38; a pointer 33 is placed opposite the end of this slot so as to indicate the exact position in the slot at which to read the figures. A row of numerals indicating prices per pound is placed on the casing just above the opening, as in the other patents showing computing scales of the cylinder type.

Mr. Davis: Copies of the several patents discussed in the above answer of the witness are here offered in evidence as showing the prior state of the art, and the Examiner is requested to mark the same as follows: "Defendant's Exhibit Phinney Patent No. 106,869," "Defendant's Exhibit Babcock Patent No. 421,805," and "Defendant's Exhibit Christopher Patent No. 588,128."

Mr. Richmond: The same objection as before is made to these exhibit patents and the testimony relating thereto.

Q. 9. Please now direct your attention to the subject of pointers or indexing means employed in connection with sight openings having transparencies, or employed in connection with other styles of scale indicating devices, and if you can do so, point to examples in the prior art of expedients of this sort employed to cover sight openings, and employed to denote the particular indication or indications which are to be read in the use of the scales.

A. The patent to Phinney, to which I referred in my last answer, is, as I stated, a computing scale of the cylinder type, having an elongated opening in front of the casing, through which to view the price and weight figures. As pertinent in answer to your present question, I call attention to the fact that at the right-hand end of the sight opening, as seen in Fig. 1 of this Phinney patent, there is a small index pointer, which is referred to as follows, near the end of the second column of the specification:

"A small index-pointer, K, arranged on the middle of one end of the slot of the drum serves to show when any circular

division of the weight scale may have reached its proper position."

Thus, as early as 1870 there is disclosed a computing scale of the cylinder type having a stationary pointer to indicate the spot on the scale to which attention should be directed for obtaining the proper weight indication.

The patent to Christopher, 588,128, August 17, 1897, which was filed January 16, 1896, to which I also called attention in my last answer, shows a similar indicator or pointer on the casing at the end of the slot to indicate the correct position on the column of figures for obtaining the desired weight.

Another expedient for facilitating the reading of computing scales is shown in the patent to Wands, No. 410,389, Sept. 3, 1889. In this patent the price and weight indications are marked on the surface of a cone instead of on a cylindrical drum, as in the patent in suit, and along the surface of this cone is stretched a wire 27, which is run in close proximity to the cone surface so as to facilitate the readings when the cone is brought into any given position by the weight of the commodity, the price and weight of which it is desired to learn.

The patent to Lyon, No. 600,837, March 15, 1898, filed April 13, 1897, is another example of a computing scale having figures marked on the surface of a revolving drum of general conical form, this drum being enclosed within a conical casing P, provided with sight openings, through which the observations may be made. These openings are in accordance with the patent specification, line 65, page 1, "closed by a glass strip P, having the datum-line Q marked thereon." These datum lines Q are shown in Fig. 1 of the drawings, and according to the specification they are marked directly on the glass.

In this Lyon patent, therefore, we have a computing scale with a movable drum, the figures marked thereon, and with sight openings covered with glass, through which to observe the figures, a datum line being marked directly on the glass to facilitate reading the scales on the drum.

Adjourned to January 12, 1912, at 10 o'clock a. m.

January 12, 1912, 10 o'clock a. m.

Met pursuant to adjournment. Present as before; Mr. Davis and Mr. Richmond.

Direct examination by Kempster B. Miller resumed.

Answer to Q. 9 continued:

The patent to Stewart, 538,981, May 7, 1895, shows a computing scale of the dial type employing a revolving dial marked with concentric circles, the outer one of which carries markings to indicate pounds and ounces, and the inner ones of which carry markings to indicate corresponding money values for different prices per pound. On a stationary member lying over this dial are numerals indicating prices per pound. For facilitating the correct reading of the scale a fine wire *d* is stretched alongside this fixed member so as to show as a fine line directly in front of the scale when viewed from the front; thus, instead of a pointer, or a line marked directly on the glass covering the opening this patent employs a fine wire tightly stretched directly in front of the dial.

The patent to Woods, 510,948, December 19, 1893, shows another computing scale of the dial type adapted for both front and back readings. Referring to Fig. 2 of this patent, the two dials are shown in section at 5 and 6. These dials are made fast on the axis 7 and always turned together. The application of the weight on the platform or platter of the scale, not shown, causes a revolution of the dials, the amount of their angular movement being proportional to the amount of weight of the commodity being weighed. On the dials are placed numerals adapted to show both weight and corresponding monetary values and there are openings 3 in both front and rear sides of the casing through which these figures may be viewed. Concerning these openings or windows the patent specification says, line 22, page 1, that the casing or cabinet "has a window 3 on each side which *may be glazed if desired*" (italics mine).

Across these openings are stretched wires 5′ and 6′ (Figs. 3 and 4) to serve as indicators to facilitate the reading of the dial.

In this patent we have, therefore, computing scale arranged for both front and back reading, the openings on the opposite sides of the casing being covered with transparent material and having stationary pointers adapted to correspond with each other in their indications of figures on each side. These

pointers in this patent are not placed directly on the glass in the form of markings thereon, but are made of wires stretched alongside of the glass to serve the same purpose.

Mr. Davis: Copies of patents discussed by the witness in the last answer and not theretofore referred to by him are now offered in evidence showing the prior state of the art, and the Examiner is requested to mark the same as follows:

"Defendant's Exhibit Wands Patent 410,389."

"Defendant's Exhibit Lyon Patent 600,837."

"Defendant's Exhibit Stewart Patent 538,981."

"Defendant's Exhibit Woods Patent 510,948."

Mr. Richmond: The foregoing exhibits objected to as irrelevant and immaterial, together with the testimony relating thereto, and objection is also made on the ground that the patents referred to were not set up in defendant's answer, so that complainant has not heretofore had notice that they would be relied upon in defense.

Q. 10. Please briefly treat claim 2 of the patent in suit, 597,300, with reference to the file-wrapper and the prior art that you have discussed in the course of your deposition up to this point.

A. In order that the elements of this claim may be more clearly grasped I will read the claim on the record, using the exact language of the claim, but dividing it or paragraphing it in accordance with what seems to me to be its natural divisions.

Claim 2.

"In a scale of the character described, the combination with,

"(1) a casing having openings in opposite sides but not opposite each other, of

"(2) a revoluble drum provided with a series of columns of figures representing dollars and cents and two independent columns of figures representing weights in pounds and ounces, one column of the latter being arranged to be read from the same side of the casing as the figures representing dollars and cents, and the other column of weight-figures being arranged to be read solely through the opening in the opposite side of the casing, the figures representing dollars and cents not being visible from said opposite side, the openings in the opposite sides of the casing being covered with

"(3) transparent material having

"(4) stationary pointers thereon adapted to correspond

with each other in their indications of figures so that when the pointer on one side indicates one figure in one column, the other pointer on the other side will indicate exactly the same figure in the other column."

The earlier Smith reissue patent and also the patents to Phinney and Christopher showed computing scales of the character described, that is, scales of the cylinder type with both monetary and weight figures marked thereon and adapted to be viewed through sight openings in the casing. The only things covered by this claim that are not shown by these three earlier computing scale patents was the added row of reversed figures representing weights, the rear sight opening and the glass coverings for both openings with stationary pointers on each. The earlier Smith patent, however, showed a glass covering for its front opening with stationary markings thereon.

As shown by the file-wrapper and contents, the Pottin patent was admitted by applicant to anticipate the feature of the two reversed rows of numerals on a cylinder with front and back sight openings. In addition to the Pottin patent the patents to Chase, Patterson, Koch, Lovell, Carr and Fuller may be cited as showing this feature.

Applicant admitted the lack of patentable novelty in a cylinder scale having a casing with front and rear openings not in alignment with each other and a revolving drum with a double row of reversed weight-indicating figures and with other rows of price-indicating figures, one column of the weight-indicating figures being visible only through the rear opening and the other column of weight-indicating figures and price-indicating figures being visible through the front opening, by acquiescing in the Examiner's rejection on the earlier Smith patent taken in connection with the Pottin patent.

The Examiner, in his action of December 2, 1897, stated that it did not involve invention to place transparent material over the reading openings, and cited the patent to Hoyt to show the lack of novelty in such procedure. Applicant acquiesced in this view by further amending claim 1 in his next amendment. In addition to the Hoyt patent cited by the Examiner as showing transparent material over the sight opening I may point, for instance, to the patent to Patterson which shows "glass covering reading openings" in both the front and back of the casing for the same purpose as employed by the patent in suit. The patent to Woods and the earlier Smith patent are other examples.

It was applicant's final amendment to claim 2 which made the Examiner consent to allow the claim, and this amendment, as shown by the file-wrapper, brought in the stationary pointers on the glass coverings of the two openings, and if there is any novelty in the claim it must rest in these stationary pointers marked directly on the glass and arranged to give corresponding readings, both front and back.

It is, of course, common practice, as is well known, to mark indications directly on glass as, for instance, in thermometers, and I might cite other examples within my knowledge. It is to be noted, furthermore, that it was common in the art pertaining to computing scales to place stationary pointers on the casing adjacent to the opening, as shown by Phinney and Christopher, for instance, and to stretch wires across the surface carrying the price and weight indications, as shown in Wands and Woods. The latter patent, it is to be noted, shows such stationary indicators in the form of wires across glass covered openings on both the front and rear sides of the casing.

I conclude, then, that if there is any novelty whatever in the claim involved in the suit it is the marking of the stationary pointers directly on the glass covering the front and rear openings of the casing so that they will show corresponding readings from each side of the scale.

Q. 11. Please now compare said claim 2 with Complainant's Exhibit Defendant's Scale, carrying along such allusion to file-wrapper and prior art as may seem appropriate to you.

A. Defendant's scale as exemplified in Complainant's Exhibit Defendant's Scale is a computing scale of the cylinder type, but unlike the scale of the patent in suit it does not employ springs which yield proportionally under the influence of the weight of the commodity being weighed. On the contrary it acts on an entirely different principle, employing no springs for such purpose, but counterbalances the weight of the commodity being weighed by a movable pendulum. The draw bar in defendant's scale is moved downwardly an amount proportional to the weight of the commodity being weighed and transmits its longitudinal movement to a corresponding rotary movement of the drum. Instead of employing two draw bars as does the scale of the patent in suit, and two racks and pinions, one at each end of the cylinder, defendant's scale employs but a single one, all of the force for moving the cylinder being applied at one end of the cylin-

der shaft. Structurally the two scales as a whole are radically different, and they operate on different fundamental principles since the scale of the patent employs springs to counteract the force of gravity, while defendant's scale counteracts gravity by another gravitational force.

The computing cylinder of defendant's device is of the same general type as that shown in the patent in suit and in the prior art. It is mounted on bearings and is operated by a single rack and pinion. In this respect representing the prior art patents to Phinney and Babcock for instance, which employ only a single rack and pinion, more closely than it resembles the patent in suit, which employs two.

Comparing defendant's device with the structure set forth in the claim, I may say that defendant's device is a scale of the drum or cylinder type of the same general character, so far as the drum or cylinder and its general mode of operation is concerned as the drum of the patent and as the drums of the prior art such as disclosed in the Phinney patent, for instance. It is of the general class which employs both weight and monetary figures on a cylinder visible through openings in the casing to show not only the weight of an article in question but also by direct reading its value at given prices per pound.

Defendant's device has, in accordance with the language of the claim, "a casing having openings in opposite sides but not opposite each other." This feature, as I have said, is found not only in the patent in suit, but in various patents of the prior art, as well exemplified in the patents to Koch, Lovell, Chase and Fuller, for instance. I will again refer at this point also to the patent to Woods, which is for a computing scale having openings on opposite sides of the casing, for the same purpose.

Coming to the next element in the claim relating to the revoluble drum, defendant's device has, in accordance with the language of the claim, "a series of columns or figures representing dollars and cents." It has this in common with a great many computing scales of the prior art. For instance, Phinney, Babcock and the Smith reissue patent. The next clause in the claim, "two independent columns of figures representing weights in pounds and ounces," is in accordance with the markings on defendant's cylinder, but is not in accordance, as I have already pointed out, with the disclosure of the patent in suit since the patent in suit does not have two independent columns of figures representing ounces, it em-

ploying a common column of ounce figures for the two columns of pound figures. If, however, the language of this claim is supposed to be descriptive of the disclosure of the patent in suit, then there is a divergence between its meaning and defendant's device, since defendant's device does employ two separate columns with respect to both pounds and ounces, while the disclosure of the patent is for separate columns of pound figures and a common column of ounce figures.

If we ignore this discrepancy between the language of the claim and the disclosure of the patent to which it relates, then the remaining portion of the claim which relates to one of the columns of weight figures being visible through one of the openings in the rear of the casing and the other column of figures relating to weights and the columns relating to prices being visible through the openings in the front of the casing is descriptive of defendant's device; and attention is also to be called to the fact that the patents to Chase, Lovell, Koch, Patterson, Pottin and Fuller also show in each case two columns of figures inverted with respect to each other, visible respectively through front and back openings of the casing.

Taking the first sixteen lines of the claim in suit as they stand, and the first two paragraphs of the claim as I divided it in the first part of my answer to question 10, and ignoring the discrepancy between the language of the claim and the disclosure of the patent in suit, while it is readable on defendant's device with the exception noted, it is also readable on the prior art as disclosed by the earlier Smith patent taken from the Pottin patent as pointed out by the Examiner in the progress of the application through the Office; and it is to be noted that this view was accepted by applicant in his prosecution of the case. In addition to the references cited by the Patent Office as showing the unpatentability of this portion of the claim, I have pointed also to the patents to Phinney and Christopher, for instance, and to a number of cash register patents showing rows of inverted numerals visible respectively through front and back openings in the casing.

The next element in the claim is the transparent material covering the openings in the casing. This defendant's device has, but I call attention to the fact that it is the commonest kind of an expedient in the arts in general to cover any sort of an opening through which one wishes to see with glass; and also to the fact that the Examiner stated in his action dated December 2, 1897, that it did not involve invention to place transparent material over reading openings, and cited

the Hoyt patent as an example of a computing scale with such glass covered opening. I have called attention to a number of other examples of glass covered sight openings and will merely refer again to the patents to Patterson and Woods, for instance, both of which show both front and rear sight openings covered with glass, the latter patent showing such openings in the casing of a computing scale. The Smith reissue patent shows a glass covered sight opening with stationary markings on it.

Recess.

T. H. Sheridan appearing for complainant.

It is apparent, then, that whatever novelty there is to be found in the claim must be looked for in the stationary pointers directly on the glass as recited in the last or fourth paragraph of the claim in suit as I divided the claim in the first part of my answer to question 10. Comparing this portion of the claim with Complainant's Exhibit Defendant's Scale, I will say that defendant's scale employs a wire stretched across the entire length of the opening on the front of the scale behind the glass lenses which are employed to magnify the markings on the scale. This wire extends from one end of the cylinder to the other so as to form a single line across the monetary and the weigh indications as viewed from the front of the scale. In the rear sight opening of defendant's scale a thin strip of metal turned edgewise toward the observer is stretched across the opening and this, like the wire employed at the front opening of the scale, is entirely independent of the glass covering the opening.

In the patent in suit the pointers for indicating the zero position of the cylinder are illustrated as being in the form of small arrows shown at 26 in Figs. 1 and 2, and of these the specification says that they are "placed upon the glass over the openings 23 and 24 at the proper point to register with zero in columns *a* and *b*, respectively." In the language of the claim in suit also the arrows or pointers are specified as being upon the glass.

Defendant's wires for facilitating the reading are not in any sense placed upon the glass, but are mounted directly on the casing, and remain in place even when the glass coverings are removed. Since claim 2 of the patent in suit was granted only after it had been made to include specifically the stationary pointers upon the glass, and since there are

many examples in the arts in general, and in the computing scale art in particular, of wires stretched across the sight openings to facilitate accurate reading, it is not seen how defendant's arrangement can lie within the description of the claim in this respect.

In defendant's scale magnifying lenses are used in front of the price or monetary figures at the front of the scale and behind these lies the indicating wire. In front of these lenses, which of course are of glass, there is a glass covering for the entire opening through which both monetary and weight values are read, this covering also being entirely independent of the indicating wire and lying about a half an inch in front of it.

The patents to Wands and to Woods both show wires stretched across the face of the surfaces carrying the price and weight figures. In the case of the Woods patent such wires are employed to facilitate the reading of figures displayed through both front and back sight openings and in such manner as to give corresponding readings on each side of the scale. If no distinction is to be made between a mark or pointer directly on the glass and an indicating wire independent of the glass, then it is quite obvious that the one feature of alleged novelty on which claim 2 of the patent was granted fails, since the indicating wires are old in Woods and Wands.

The use of a wire stretched across the face of the cylinder behind and independent of the glass coverings for the openings offers several distinct advantages over the scratching or marking of the indicating wire directly upon the glass as contemplated in the patent in suit. By means of the wire it is possible to get a very thin indicating line which will always stand out in marked contrast with the surface of the cylinder behind it. It is not such an easy matter to produce such a thin line, of such a pronounced character, upon the surface of a glass window. Again, a single wire stretched across the entire reading surface of the cylinder assures perfect alignment of the datum line throughout its entire length, an important feature from the standpoint of accuracy. Where the long front opening of the scale is composed of more than one piece of glass, as is common practice, the separate lines on the different pieces of glass will not necessarily be in perfect alignment and, in fact, are likely not to be unless extreme care be taken. Another point in favor of the stretched wire datum line is that it is readily fixed in the exact proper position with

respect to the cylinder chart—much more so than where the line is placed on a piece of glass with the requirement that the whole glass be accurately adjusted as to position. Again, it is desirable to place the indicating line quite close to the cylinder so that there may be as small an error as possible due to paralax. The stretched wire indicating line greatly facilitates the reduction of this error, and tends to avoid the possibility of optical illusions in reading the scale when used in connection with lenses such as are ordinarily employed.

I call attention to the fact that in Complainant's Exhibit Cylinder Scale a small metal pointer is used to facilitate the readings of weights only, this being a pointer projecting from one side of the sight opening at both the front and rear of the scale. There is no pointer for the monetary scale readings in this exhibit, the top and bottom edges of the slot serving in this case as the guide. In the exhibit entitled Complainant's Exhibit Complainant's Scale a sight-wire lying back of the glass lenses extends throughout the entire length of the scale on the front side and thus serves as an indication for both the weight and the monetary readings. As in Complainant's Exhibit Defendant's Scale, a separate glass window extends in front of the entire length of the cylinder so as to disclose to view both the weight and monetary readings of the cylinder.

I conclude this answer by saying that the one element which gave apparent novelty to the claim in suit was the element added in the last amendment to the claim which embraced the stationary pointers directly on the glass, so placed as to correspond with each other in their indications for both front and back readings; and that this feature upon which the claim must rest for patentable novelty is absent from defendant's scale.

Mr. Sheridan: This answer is objected to as irrelevant, immaterial and inadmissible as referring to patents not set up in the answer.

Q. 12. Please now direct your attention to patent in suit reissue No. 11,536, and state your understanding of its disclosure.

A. The reissue patent No. 11,536 to Smith ns for a computing scale of the cylinder type, employing springs for permitting the downward movement of its draw bars and racks when subjected to the pull due to the weight of any commodity or article placed on the weighing platter. Through a system of equalizing cross bars the downward movement due

to the pull of the article being weighed is transmitted to two rack-bars, one at each end of the chart cylinder, and these rack-bars engage two corresponding pinions, one on each end of the chart cylinder shaft, so as to produce a corresponding rotary movement of the chart cylinder itself. On the cylinder there are placed numerals indicating pounds and ounces, these being arranged in a column in the middle portion of the cylinder with respect to its length, and in adjacent columns there are placed figures indicating corresponding prices to be charged at varying prices per pound. The cylinder is enclosed within a casing in the front of which is placed an opening through which the weight and price figures on the cylinder may be viewed. Immediately below this opening, which is in the form of a long, horizontal slot, there is a row of figures on the casing which indicate prices per pound. As a result, when the cylinder is rotated by the downward pull of any article being weighed, it will bring into view through this slot figures representing the weight of the article in pounds and ounces and also a number of figures representing the price to be charged for the corresponding weight at various prices per pound. The operator has only to look on the stationary scale for the price per pound appropriate for that article when he will find immediately above it on the cylinder the amount to be charged.

The opening in the front of the casing through which the figures on the cylinder are brought to view is covered with a glass plate *w'* and on this glass is printed the series of figures which indicate prices per pound.

A good deal of the patent specification is devoted to the arrangement of cross-bars and draw-bars by means of which the downward movement of the weighing platter, due to the weight of the article being weighed, is transmitted to the rack-bars, and is conteracted by the pull of the springs. Also a considerable portion of the specification is devoted to the method of marking the price and weight indications on the surface of the drum. A good deal of stress is laid in the patent on the necessity for lightness in the drum proper, and a few lines are devoted to a description of the construction of the drum. The specification merely states that the drum is constructed of thin skeleton frames, while the periphery is formed of a thin sheet of paper pasted to the frames.

Q. 13. Please compare claims 5 and 6 of this reissue 11,536 with claim 2 thereof, claims 5 and 6 being the particular claims which have been put in issue:

A. Claim 2 of this patent reads as follows:

"2. The combination of the indicator-drum constructed of thin skeleton frames of very light material, the periphery of said drum being formed of a sheet of paper having the divisions of the weight-scale and other numerals printed thereon, the pinions carried by the shaft of said drum, adjustable conical bearings wherein said shaft is journaled, the cross-cars *c* having a suspending-clip secured thereon, the headed draft-pins supported loosely within the notched ends of the cross-bar *c* after the manner of a stirrup connection, the bow-shaped clips in the ends of the draft-pins, the springs between the coils of which said slips are inserted, whereby the tension on said springs may be altered as described, the draft-rods *k*, the yoke *n* whereby said rods are connected, the cross-rod *a'* to which the rack-bars are pivoted and whose ends are notched and embrace said draft-rods so as to be capable of sliding thereon, a ring from which the scale-pan is suspended, and suitable adjusting connections between the yoke *n* and said cross-rod *a'*, substantially as described."

Claim 5 is as follows:

"5. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder."

Claim 6 is for the same combination as claim 5, but with the additional limitation that the skeleton disks or frames are made of thin aluminum.

Comparing claims 5 and 6 with claim 2, it is obvious at once that the first few lines of claim 2 recite the drum made of thin skeleton frames and with a periphery formed of a sheet of paper. The balance of the claim specifies the pinions and shaft of the drum, the bearings for the shaft, the cross-bars, the draft-pins, the scale springs and the connecting clips for said springs, together with the supporting rings and various adjustment means, the whole combination embracing the complete scale mechanism.

The essential difference between claim 2 and claims 5 and 6 is that the latter two claims recite merely the indicator drum made of spindle and skeleton frames with a paper periphery, while claim 2 covers the same elements involved in the drum in combination with the other parts of a complete scale.

Q. 14. Please state in what respects the reissue 11,536 and the original patent 545,616 differ.

Mr. Sheridan: This question is objected to as immaterial and irrelevant.

A. The drawings in the original and reissue are substantially the same, as are also the specifications. Claims 1, 2, 3 and 4 in the reissue are the same as the four claims in the original. Claims 5, 6 and 7 of the reissue are not found in the original, and the essential difference between the reissue and the original patents is, therefore, the inclusion in the reissue of claims 5, 6 and 7.

Adjourned to January 13, 1912, at 10 o'clock A. M.

Mr. Davis: A copy of the original Smith patent is offered in evidence and the Examiner is requested to mark the same "Defendant's Exhibit Smith Original Patent 545,616."

January 13, 1912, 10 o'clock A. M.

Met pursuant to adjournment. Present as before, Mr. Davis and Mr. Shedian.

Direct Examination of Kempster B. Miller Resumed.

Q. 15. Please state what you mean when you say that the drawings and the specifications of the original and reissue patents are "substantially" alike.

A. I mean that they are alike in all essential respects but that there are certain wholly immaterial differences which in no way alter the sense of the disclosure.

Thus, with respect to the drawings, I note that on Fig. 5 of the original patent the zero line on the fact of the drum chart is shown by a heavy full line marked *w'*. The zero line on the same figure of the reissued patent is not shown as a full line but by two parallel, thin, straight lines. Both are referred to by the same reference letter *w'* and both are described in identically the same language in the specification.

The two specifications are identical with the exception that at the end of the first paragraph of the reissue specification I find the following words:

"reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification."

This clause does not occur in the specification of the original patent, and of course it has no possible effect on the disclosure.

With these trivial exceptions, which are wholly matters of form and not of sense, the specifications and drawings of the reissue and original Smith patents are identical.

Q. 16. Please briefly review the history of the application for original patent 545,616, in which connection I invite your attention to a certified copy of the file-wrapper contents and drawings thereof.

Mr. Sheridan: The question is objected to as immaterial, irrelevant and incompetent.

A. The application of the original patent by Smith, 545,-616, was filed, as shown by the copy of the file-wrapper and contents on May 2, 1895. The specification as filed was never modified, and is the same as it appears in the original patent. As originally filed the application had three claims of which claim 1 is without modification claim 1 of the patent.

In the first Office action dated June 4, 1895, the Examiner rejected claim 3 on the patents to Gerard, No. 459,108, September 8, 1891, and to Barker, No. 67,482,—August 6, 1867. This claim related to means for compensating for different weights of scale pans, and was cancelled by the first amendment filed by applicant's attorney on June 26, 1895. In its place was substituted a new claim 3 which is the present claim 3 of the issued patent.

In this same amendment of June 26, 1895, a fourth claim was added which, however, was subsequently cancelled in response to rejection by the Examiner.

In the Office action of July 9, 1895, the requirement was made with respect to claim 2, which at this time stood as originally filed, that "the rack bar *c*" should be changed to "the cross bar *c*." This Office action also called attention to the probability of an interference with the issued patent to Swihart No. 539,599, May 21, 1895.

The next amendment by applicant was dated July 11, 1895, which complied with the requirement of the Examiner with respect to claim 2 and which amounted merely to the changing of the work "rack" to the word "cross" as it occurs on line 120 of page 2 of the patent. With this change claim 2 as originally filed became claim 2 as it stands in the patent.

On July 30, 1895, the Examiner again acted on the case, rejecting claim 4 on the ground that it covered an incomplete combination. This action also stated that the interference referred to in the previous action would not be declared.

The final amendment in the case was made by applicant on August 1, 1895, and it consisted in striking out claim 4 and

substituting the claim 4 which appears in the original patent as the final claim.

It appears therefore that claim 1 of the patent is the claim 1 that was originally submitted with the application. Claim 2 of the patent is the same as that originally filed with the exception that the word "cross" in line 120 was originally "rack" in the claim as filed. Claims 3 and 4 of the patent were added by subsequent amendments. There were in all three different actions by the Patent Office and three different amendments by the applicant in response thereto after the original filing of the petition.

Mr. Davis: The certified copy of file-wrapper contents and drawings discussed in the above answer is offered in evidence and the Examiner is requested to mark the same "Defendant's Exhibit File-Wrapper Original Patent 545,616."

Q. 17. Please now review the history of the application for reissue of said patent 545,616, in which connection I invite your attention to a certified copy of file-wrapper contents and drawing of the reissue 11,536.

Mr. Sheridan: The introduction of the above mentioned certified copy of file-wrapper of the original patent 545,616 is objected to as immaterial, irrelevant and incompetent. The question is objected to insofar as it related to the aforesaid file-wrapper and contents for the same reason.

A. The application for reissue of patent 545,616, which resulted in reissue patent No. 11,536, was filed January 27, 1896, as shown by the file-wrapper and contents. The specification of the reissue application was the same as that of the patent in all respects with the exception that the preamble of the reissue specification contained the clause

"reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification."

As I have already pointed out the addition of this stereotyped clause in the preamble could affect the disclosure in no possible way.

The specification of the reissue application was not changed throughout the prosecution of the case and is the same, therefore, as that which appears in the reissued patent.

The first four claims of the reissue application were the same as the claims in the original patent, and these were not changed throughout the prosecution of the reissue application.

The reissue application contained three additional claims, Nos. 5, 6 and 7, which also were not changed during the prose-

cution of the application, and stand as claims 5, 6 and 7 in the reissue patent.

The first action by the Patent Office on the reissue application rejected each of the new claims 5, 6 and 7. This action was dated March 5, 1896. The rejection of claims 5 and 7 was based on the patent to Phinney 106,869, dated August 30, 1870.

This patent to Phinney, it will be noted, is for a computing scale of the cylinder type having both price and weight markings on the cylinder; these markings or numerals being visible through a sight opening in the front of the enclosing casing so as to show not only the weight of an article but the corresponding price to be charged for that weight at any given price per pound. As in the Smith reissue patent the prices per pound were marked on a stationary scale immediately below the sight opening, and as in the reissue patent, the motion of the draft-rod due to the weight of the article being weighed was transmittted to the drum by rack and pinion mechanism. Like the Smith reissue patent the scale of this Phinney patent was a spring scale depending on the action of a spiral spring to counteract the pull due to gravity of the article being weighed.

As stated, the first action by the Examiner rejected claims 5 and 7 directly on the patent to Phinney and rejected claim 6 on the same patent on the ground that no invention was involved in making the disks or frames of aluminum. Claims 5 and 6, the ones involved in this suit, cover merely the indicator drum made up of light skeleton frames and a spindle with a paper periphery; claim 6 specifying that the skeleton frames are of aluminum. In this first action the Examiner stated that it was an

"old and well known expedient for mechanics to provide skeleton frames instead of solid ones when the quality of lightness is desired and at the same time sufficient strength retained."

Concerning claim 6 in particular the rejection on the patent to Phinney was made.

"on the ground that to make disks or frames of aluminum is not believed to involve invention because the quality of lightness is a well known one of aluminum and that metal is now extensively used where lightness and strength is desired."

Applicant then appointed as associate attorney, who on March 11, 1896, evidently after a personal interview with the Examiner, made an argument against the rejection of the

claims 5, 6 and 7. In this argument applicant's attorney made the following statement:

"Claims 5, 6 and 7 of this application do not depend for novelty upon the fact that the frames are made of skeleton metal or of aluminum, although these are desirable features, *but upon the fact that the cylindrical portion of the drum is composed of a sheet of paper.*" (Italics mine.)

After this the case was passed to issue, with claims 1, 2, 3, and 4 as in the original patent, and claims 5, 6 and 7 as originally filed in the reissue application.

Mr. Davis: Said certified copy of file-wraper, contents and drawings is offered in evidence and the Examiner is requested to mark the same "Defendant's Exhibit File-Wrapper Reissue in Suit 11,536."

Q. 18. Please now refer to prior art with which you are familiar that you may deem pertinent, having reference more particularly to the matter of composing the cylindrical portion of the drum of a sheet of paper.

A. It is of course a very old and common expedient in the mechanic arts to construct hollow cylinders consisting of frames or spiders mounted upon a shaft and covering these with various kinds of material so as to form a cylindrical surface upon such framework. I will refer to a few such instances where paper has been used as the covering.

The patent to Thompson No. 78,552, June 2, 1868, shows a device in the form of a transparency for advertising purposes. In this there is a large drum or reel as it is called in the patent mounted on a wagon upon a vertical shaft, the whole arrangement being belted to the wheels of the wagon so as to cause it to turn as the wagon moves along the street. The reel or drum is formed of two spiders E attached to the spindle or shaft F so as to revolve therewith. The periphery of the drum is of paper, as described in the patent, and within the drum is suspended a lantern, the light of which is intended to shine through the transparent paper to increase the advertising effect at night. As shown in Fig. 3 of the drawing of this patent this drum is octagonal, but the specification does not specify the number of sides but refers to the drum as polygonal. It is obvious that as the number of sides were increased the closer would be the approach to a true cylindrical periphery. It is to be noted that the specification refers to this device as a drum and claims it as such, from which a cylindrical surface is to be inferred.

The patent to May, 136,744, March 11, 1873, is for an illuminated sign or lantern. Within the lantern proper there is a revolving hollow cylinder D which, according to the patent specification consists

"of a light framework of metal covered with paper or other suitable transparent or semi-transparent material."

It is to be noted that this is referred to in the specification as "a revolving hollow cylinder" and that it is so shown in the drawings. The upper end of this cylinder is in the form of a spider, the arms of which are so inclined as to form a propelling wheel adapted to cause the rotation of the cylinder by the upward current of heated air from the lamp B. The whole cylinder is arranged for easy rotation on a cone bearing *c*, so as to permit of easy rotation.

Since this whole drum is to be rotated by the small amount of force derived from the upward currents of air from the lamp the necessity for great ease of rotation is obvious.

The cylinder of this patent is therefore of paper mounted on a disk or spider at each end thereof, the whole forming a light structure mounted for easy rotation.

Recess.

Answer to Q. 18 continued:

I will next refer to the patent to Buckingham, 544,345, August 13, 1895, filed April 16, 1894. This is a patent for a printing telegraph system, and the part of it to which I wish to refer in answer to the present question is that which relates to the disposal of the sheet of paper upon which the received message is printed, during the time while it is being printed upon. In this patent the paper upon which the printed matter is to be received is rolled up into cylindrical form, as is shown in Fig. 5. Concerning this the specification of the patent says, beginning with line 42, page 1:

"In carrying out my present invention the paper may be formed into a tube, the ends of which are placed over and fastened upon suitable supports, as a hook, at each end."

The word hook in this passage is evidently a typographical error and should be "hoop" since the support for the paper at each end is shown to be hoops and hoops are referred to elsewhere in the specification. Thus, beginning line 67, page 1, I find:

"The tube (that is the paper tube) may be formed by fastening the sheets around hoops at each end, motion of

rotation * * * being communicated from a suitable motor to a shaft to which one of the hoops is rigidly fixed." (Matter in parentheses mine.)

Referring particularly to Figures 1 and 3 of this Buckingham patent, the hoops are shown at *n* and *n'*, these being shown at each end of a paper tube in section in Fig. 1. The paper tube itself is referred to by the letter *p*. The hoop *n'* at the left-hand end of the paper cylinder is the rim of a spider wheel, the hub of which is shown at n^2. The spokes of this wheel are shown to be thin in the sectional view of Fig. 1, and the other view of them—the face view—is given in Fig. 3. This paper cylinder of the Buckingham patent is therefore mounted at this end on a skeleton frame or spider very similar to that employed in the Smith reissue patent in suit.

That this paper cylinder or drum with its supporting frames is a revoluble drum is clear, and concerning this the patent says, beginning line 12, page 3:

"The paper is rotated continuously in the same direction around the axis of the hoops."

The edges of the paper are fastened to the hoops by small clamps *g*, and the adjoining edges parallel with the axis, according to the patent specification, may be lapped or not, as desired.

Mr. Davis: Copies of the three prior patents discussed in the above answer are offered in evidence as showing the prior state of the art, and the Examiner is requested to mark the same as follows:

"Defendant's Exhibit Thompson Patent 78,552."

"Defendant's Exhibit May Patent 136,744."

"Defendant's Exhibit Buckingham Patent 544,345."

Mr. Sheridan: The above answer and the introduction of the above exhibits objected to as immaterial, irrelevant and inadmissible as referring to and introducing patents not set up in the answer, and of which, therefore, the complainant has had no proper notice.

Q. 19. I now invite your attention to Defendant's Exhibit Culmer's Sketch, and to the description thereof contained in the deposition of John W. Culmer in this cause, and will ask you to express yourself regarding such pertinency as you may deem the construction illustrated in said exhibit to have, with reference to the matter of a cylindrical portion of a drum composed of a sheet of paper.

Mr. Sheridan: The question is objected to as immaterial, irrelevant and incompetent.

A. In this Culmer sketch there is shown a computing scale of the spring actuated type. This scale employed a paper cylinder or drum arranged within a cylindrical casing of sheet metal. This casing had a vertical slot or side opening through which the paper drum or cylinder could be viewed. When in position for use the axis of this cylinder was vertical, so that the sight slot in the casing was also vertical and, as will be noted, it extended through practically the entire height of the cylinder. The space on the casing just to the left of the sight opening was marked with pounds and ounce figures and a pointer attached to the draft-bar J was so arranged as to move up and down this scale on the casing corresponding with the stretch of the spring I under a given weight, and thus indicate the weight of the article. On the surface of the paper cylinder within the casing were marked rows of price figures, and any set of price figures on the drum corresponding to a given price per pound could be brought into view through the sight slot by turning the paper cylinder by hand. Thus, in the figure shown at the left of Culmer's sketch, the price column corresponding to 10 cents per pound is indicated, and it is obvious that when the pointer L was drawn down by a weight attached to the hook below the left-hand scale would indicate its weight and the right-hand scale its price at 10 cents per pound.

Coming now to the consideration of the paper cylinder proper it is obvious, from Mr. Culmer's sketch and his description, that the framework for this consisted of two cast iron rings having a diameter slightly smaller than the internal diameter of the metal casing. To the cylindrical surface of these two rings was fastened the paper chart bent into the form of a cylinder so that the two metal rings and the paper chart itself formed a unitary structure capable of being rotated as a whole within the outer casing.

Mr. Culmer, in his deposition, describes the material of which this chart was made as being of pasteboard, but later, in answer to Q. 16, he said that they were of two-ply Bristol board about 9/1000 of an inch in thickness, as near as he could judge.

This exhibit affords an excellent example of an indicator drum for weighing mechanisms consisting of skeleton frames or rings having secured to their peripheries a sheet of paper or thin Bristol board so as to form a cylinder for carrying the computing figures.

Q. 20. Please now take up and discuss such other prior art as you can which you may consider pertinent, having reference to the proposition of making up a scale drum of disks and cylindrical shells whether the latter consist of paper or other material.

A. The patent to Phinney, No. 106,869, August 30, 1870, to which I have already alluded several times, shows a hollow cylinder in a computing scale to which I wish to call attention in answer to the present question. There are really two drums in this Phinney patent, as indicated most clearly in Fig. 4, but these two are mounted side by side on a single axis with the actuating pinion located also on this axis and between the two drums. The patent does not state of what these computing cylinders are made, but it is evident from an inspection of Fig. 3, the sectional view through the cylinders, that they are hollow, and constructed evidently with a view to lightness. There is evidently a wooden shaft to which disks are secured, these disks forming the cylinder heads. The cylindrical surfaces of the cylinders are of some thin material the character of which is not stated. The method of marking the surfaces of the cylinders with graduations and figures corresponding to weights and with other graduations and figures corresponding to prices, is fully disclosed in this Phinney patent and is, as I have said, similar to the method employed by Smith in the reissue patent in suit.

The drawing of this patent clearly shows an indicating drum for weighing mechanism consisting of a spindle provided with a plurality of disks, which disks support on their peripheries a hollow cylinder of which the material is not stated.

The patent to Palmer, 328,804, October 20, 1885, is for a cylindrical scale beam for use in a computing scale. The structure of the cylinder is best shown in section in Fig. 2. This clearly discloses a shaft A upon which are mounted two end disks which are evidently of metal. Each of these end disks has a cylindrical periphery which fits into and supports the computing cylinder B. The material of which this cylinder is made is not definitely stated, but it is evidently of metal. A sliding weight C is adapted to slide back and forth on the surface of the cylinder, so as to balance the beam for any given weight. The part of this device which I wish to call attention to particularly in answer to your question is the spindle with its two end plates or disks, and the cylindrical member B, which is supported by these end members or disks.

The patent to Gibson, No. 330,690, November 17, 1885, shows a computing scale having a cylinder very similar to that of the patent to Palmer just referred to. In this case the spindle or shaft of the cylinder is formed by the tube C. On this spindle or shaft C there are two end pieces B', B^2, with flanges adapted to support the cylinder proper which in this case is of glass. Concerning this the patent says that this glass is lined with white pasteboard or similar substance, which carries the necessary markings. As an alternative the patent states that the cylinder may be made of any suitable opaque material and the graduations marked directly upon the exterior thereof.

The patent to Babcock, 421,805, February 18, 1890, has already been referred to, but I mention it again in answer to the present question in order to call attention to the fact not heretofore mentioned, that the cylinder is clearly shown to be hollow and is evidently made up of disks secured upon the shaft B, these disks in turn carrying the outer cylindrical surface upon which the weight and monetary figures are marked. The sectional Figure 3 clearly shows the shaft B and also the section of the cylinder proper. The material of which this cylinder is made is not stated in the patent, but it is evidently thin and of such a nature as to permit the various monetary and weight figures to be inscribed directly thereon.

This Babcock patent shows, unquestionably, an indicating drum for a computing scale which consists of a spindle provided with a plurality of disks which support the peripheral surface of the cylinder.

The patent to Kepler, 514,475, February 13, 1894, shows a computing scale in which the drum or cylinder carries monetary indications, and is adapted to be revolved by hand so as to bring any set of price figures within range of the sight slot in the enclosing casing. The sectional view of Fig. 2 shows the cross-section of the drum or cylinder. The drum G is journaled on a shaft so as to rotate in bearing, the cylindrical surface being supported and secured to this shaft by means of skeleton frames or spiders, one of which is clearly shown in Fig. 2. This drum or cylinder is adapted to be rotated within the cylindrical casing H, and a portion of the cylinder surface is to be seen through the slot or sight opening in this casing H.

Of just what material the peripheral surface of the cylinder G is made the patent does not state, but that it is thin and is mounted on skeleton frames secured to a spindle is perfectly clear from the drawing and specification.

The patent to Wise, 532,129, January 8, 1895, filed March 5, 1894, also shows a computing attachment for such scales in the form of a cylinder mounted on a scale beam. This cylinder is turned into the proper position for showing the price of the given weight of material by being so related to the sliding weight on the scale beam that the movement of the weight along the beam will automatically turn the cylinder to the desired position.

The specification of this patent says, beginning with line 72, page 1:

"This cylinder may be made of any approved material *light* sheet metal being usually employed for the purpose." (Italics mine.)

As end disks would necessarily be employed for connecting this light sheet material forming the periphery of the cylinder to the shaft or trunnions upon which it revolves, it is evident that this patent affords an example of a cylinder or drum for computing scales provided with a plurality of frames or disks around which extend a sheet of thin material, in this case, light metal, this sheet of thin material forming a cylindrical surface for carrying the necessary designations.

The British patent to Wise, No. 678 of 1895, applied for January 10, 1895, is for a computing scale of the cylinder type. It is to be noted that this patentee is evidently the same man who took out United States patent 532,129, to which I have just referred. My reasons for believing them to be the same person are that their initials and first names are the same and in each case the residence is Las Vegas, New Mexico. The cylinder of the scale shown in this British patent is exactly the same in all essential respects as that of the reissue patent to Smith here in suit. Referring to Fig. 4 of this British patent the cylinder shaft is shown at H, and to this is secured the disk I forming one of the end supports of the cylinder proper, G, which the patent describes as being of paper.

I quote from the specification, beginning with the last paragraph on page 1:

"G is the computing cylinder, which is pivotally carried on the axis rod H journaled in the uprights D, and *is composed preferably of light and thin material such as paper, cylindrically mounted on disks I secured to the axis rod.* The cylinder is arranged concentric with its casing and is of such diameter that its peripheral surface is just within, but close to the inner surface of the exterior casing." (Italics mine.)

Referring to the tables of figures carried by the surface of this cylinder this patent says that "these tables may be printed on paper and secured to the surface of the cylinder, or the figures may be impressed directly thereon. This patent, therefore, discloses the identical method employed by Smith in the patent in suit of forming his cylinder, the structure consisting of a shaft with light disks or frames secured thereto, these having secured to their peripheries a sheet of paper forming a cylinder.

Mr. Davis: Copies of patents discussed in the above answer in addition to such as have already been offered in evidence, are now offered in evidence as showing the prior state of the art and the Examiner is requested to mark the same as follows:

"Defendant's Exhibit Palmer Patent 328,804."
"Defendant's Exhibit Gibson Patent 330,690."
"Defendant's Exhibit Kepler Patent 514,475."
"Defendant's Exhibit Wise Patent 532,129."
"Defendant's Exhibit Wise British Patent 678 of 1895."

Mr. Sheridan: The foregoing answer and the exhibits introduced are objected to as irrevalent and immaterial and inadmissible as referring to patents not set up in the answer and as insufficiently proven.

Q. 21. I now invite your attention to Defendant's Exhibit Dayton Cylinder Scale, and will ask you to examine the cylinder thereof and state what you find to be its construction.

A. The cylinder of this scale consists of a central shaft or spindle to which are secured two thin iron skeleton frames circular in form and concentrically mounted on a shaft. On the peripheries of these disks or skeleton frames is carried a cylinder or paper, this being formed by wrapping a sheet of paper upon itself so as to secure several thicknesses which are pasted to each other. On the outer surface of this paper cylinder is pasted a sheet of paper upon which are printed the various divisions and figures for giving the necessary price indications.

This exhibit is a complete embodiment of an indicating drum for a weighing mechanism consisting of a spindle provided with a plurality of skeleton frames secured to the spindle, and having secured to the peripheries of these skeleton frames paper forming a cylinder.

Adjourned to Monday, January 15, 1912, at 10 o'clock A. M.

January 15, 1912, 10 o'clock A. M.

Met pursuant to adjournment.

Present:

Mr. Richmond and Mr. Davis.

Q. 21a. Please now make a brief comparison of the claims in suit, i, e., claims 5 and 6 of reissue 11,536, with the prior art that you have discussed in preceding answers.

A. Claims 5 and 6 of the reissue patent in suit read as follows:

"5. An indicator drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder,

"6. An indicator drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton disks or frames of thin aluminum having a sheet of paper extending around and secured to their peripheries to form a cylinder."

These two claims may be treated together in the comparison with the prior art since the only substantial difference between them is that claim 5 specifies the skeleton frames to be of light material and claim 6 specifies them to be of thin aluminum. This distinction between the two claims is, in my opinion, of no importance, since to employ aluminum where lightness was desired was an old and common expedient long before the filing of the application of the original Smith patent, of which the patent in suit is a reissue.

Applicant's statement of the alleged novelty of these claims made by his attorney in the argument of March 11, 1896, was that the novelty consisted in making the cylindrical portion of the drum of a sheet of paper. I quote from this argument:

"Claims 5, 6 and 7 of this application do not depend for novelty upon the fact that the frames are made of skeleton metal or of aluminum, although these are desirable features, but upon the fact that the cylindrical portion of the drum is composed of a sheet of paper."

The covering of the skeleton frame with paper seems, then, to be the important feature of these claims, and it was apparently upon the strenght of this argument that the Examiner allowed these claims which he had previously rejected. For examples in the prior art of skeleton frames covered with paper I call attention to the patents to Thompson, May and Buckingham, each of which shows a skeleton frame con-

sisting of disks or spiders or rings supporting a shell of paper to form a drum.

It is to be noted also that E. W. Wise, of Las Vegas, New Mexico, who took out the British patent No. 678, 1895, had in mind the use of paper cylindrically mounted on the peripheries of thin disks secured to a spindle so as to form an indicating drum for use in a computing scale; in fact, the drum structure which he shows in his British patent is substantially identical with the disclosure of the Smith reissue patent in suit.

Referring to the drum of the computing scale in Defendant's Exhibit Dayton Cylinder Scale, which I understand to be glued, pasted or otherwise secured to the center spider. shaft to which are secured two skeleton disks of thin cast iron, to the periphery of which is secured a paper cylinder. These skeleton frames or disks of cast iron are comparatively thin and light and while no effort has been made to reduce their weight to an absolute minimum, yet they may, in my opinion, be referred to as light skeleton frames. The paper cylinder is made by winding a sheet of paper upon itself into the form of a cylinder, and outside of this a sheet of thinner paper forming the printed chart is placed. This paper cylinder rests upon the peripheries of the disks or skeleton frames. I have no hesitation in saying that this cylinder of the computing scale known in this case as Defendant's Exhibit Dayton Cylinder Scale, is an embodiment of the structures set forth in claims 5 and 6 with the exception that iron instead of aluminum or some other lighter material is employed. The choice of material for this purpose is one entirely within the ordinary skill of the art; and in this connection I call attention to the fact that the skeleton frames in Complainant's Exhibit Defendant's Scale are made of iron or steel and not of aluminum. This iron has evidently been copper plated.

The use of cylindrical drums built up by securing disks or skeleton frames or spiders, as they are often called, to a shaft as a support for a cylindrical outer surface is, of course, well known and very common in the arts. The patent to Phinney, for instance, shows a drum for use in a computing scale which consists of circular end disks secured to a spindle or shaft and carrying on their outer edges or peripheries the cylindrical surface material of the drum. This Phinney patent and the other patents to which I have referred, such as those to Wise, Palmer, Babcock and Gibson, all show indi-

cator drums for weighing mechanisms, in which there is a spindle carrying circular disks which in turn support cylin- disks and in the cylinder portions proper, and with the fur- scales. Except for the character of material used in these drical surfaces carrying the required indicia for computing ther possible exception that the disks are solid rather than "skeleton," these patents show structures that fall within the language of claims 5 and 6. I believe that the choice of material, such as aluminum and paper, or "light material" and paper, as specified in the claims, is one of ordinary me- chanical skill, common in the art.

Q. 23. Speaking from your general experience in the arts, what should you say that the term "a thin sheet of paper," employed in the specification of the reissue patent in suit, signifies?

Mr. Richmond: Objected to as immaterial and incompe- tent, inasmuch as the disclosure of the patent does not seem to need explanation from one having the qualifications stated by this witness.

A. I would say that the term would promamly refer to some thin paper, on the order, perhaps, of that upon which the carbon copies of this deposition are being taken, although of course that is not extremely thin paper.

Q. 24. How should you class this sheet of material that I now hand you?

Mr. Richmond: Same objection.

A. I would call this a very heavy paper, or a thin Bristol board. It is apparently of about the weight of some of the thinner Bristol boards.

Q. 25. What do you understand that sheet of material to represent, insofar as it relates to the subject of this litiga- tion?

A. This is one of the price and weight charts—cylinder charts—employed by the defendant company. It is, as I un- derstand it, the chart as it comes from the lithographer and before any treatment, such as required to make it suitable for use in scales, is given it.

Q. 26. How does this chart sheet compare as to material of which it is composed, with prior art material that has been employed for the cylindrical portions of drums? I refer to prior art that you have already discussed, including prior art other than that represented by prior patents.

A. I do not know the exact thickness of this chart sheet which you have handed me, and have no means here in this

room for accurately measuring it. I note that Mr. Culmer in his deposition, in answer to Q. 16, stated that he employed a "two-ply Bristol board" in the neighborhood if .009 inch in thickness. I would expect to find on accurately measuring this chart sheet that it was not very far from the thickness specified by Mr. Culmer, perhaps a little thinner than 9/1000 of an inch.

Comparing this chart sheet with the material of which the cylinder in "Defendant's Exhibit Dayton Cylinder Scale" is made, I will say that that cylinder is apparently made of something like Manila paper, much looser in grain than the chart sheet you have submitted. As near as I can judge this Manila paper of the Dayton cylinder scale is not very far from the same thickness as the chart sheet you submit, but it is rolled up upon itself so as to form a cylinder wall considerably thicker that would be formed by a single thickness.

Q. 27. As between Mr. Culmer's Bristol board and what is termed in the specification of the reissue patent in suit "a thin sheet of paper," how should you say this chart sheet we have here would more naturally classify?

Mr. Richmond: Same objection.

A. This chart sheet is certainly not "a thin sheet of paper." It is very much more like Mr. Culmer's Bristol board than it is like "a thin sheet of paper" in its general mechanical characteristics.

Mr. Davis: The Examiner is requested to mark for identification the chart sheet in question "Defendant's Exhibit Defendant's Untreated Chart Sheet." It will be identified as such in connection with the deposition of another witness and then formally offered in evidence.

Q. 28. Please now state the extent of any directions that you find in the specification of the reissue patent, as to the character or degree of thinness or lightness of materials for the cylinder or drum, or as to treatment or assembling or mounting or securing together of the parts thereof.

A. The patent is silent on most of these points. It devotes a great deal of attention to statements concerning the necessity and desirability of lightness for the drum, and it says that "*v* is an indicator drum which is rigidly secured to the shaft *s*." The only other description of the structure of the drum begins on line 101, page 1, and is as follows:

"I have constructed the drum of thin skeleton frames *w* of aluminum, while the periphery is formed of a thin sheet of paper fastened to the frames."

There is nothing whatever in the patent instructing one as to the character of paper to be used, except that it is "a thin sheet of paper." How thin is shall be or what other characteristics it should have is not stated. There is absolutely no instruction as to the thickness or thinness or weight of the aluminum frames except as given in the sentence just quoted. No statement is made as to the treatment of the thin paper which is to form the chart, and in fact there is no intimation that any treatment is desirable or necessary.

No instructions are given as to the assembling of the drum except that it is rigidly secured to the shaft, and except that the thin sheet of paper is to be pasted to the frames. How the parts are to be secured together is not stated, and no instructions are given concerning the balancing of the drum after it is manufactured, and in fact there is no intimation that any such balancing is necessary or desirable.

The patent merely makes the bare statement that the drum is made of thin skeleton frames of aluminum and that the periphery is formed of a thin sheet of paper pasted thereto.

Q. 29. Please now consider the cylinder or drum that is a part of Complainant's Exhibit Defendant's Scale, and discuss it having reference to the same subjects that are reviewed in your last answer.

A. The cylinder of the scale in question is composed of three spiders mounted on a central shaft, these spiders being struck up from sheet iron or sheet steel, copper plated. The two end spiders are soldered to hubs which in turn are pinned to the shaft. The center spider has a hub which is attached to the shaft by four set-screws in such manner as to provide a certain degree of adjustment with respect to the centering of the spider on the shaft, the hole through the hub of this center spider being considerably larger than the shaft so as to permit such adjustment.

The metal of which each of the spiders is formed is turned out near the circumferential edge so as to form a circular flange upon which the paper chart is to be secured. The chart itself is formed of heavy paper and is marked with the same set of indications, so far as I can see without making a minute comparison, as those on the untreated chart sheet forming "Defendant's Exhibit Defendant's Untreated Chart Sheet." The chart sheet of the completed drum differs from the untreated sheet in that both of its sides have been coated with some moisture resisting compound to avoid its changing with varying conditions of moisture and heat.

Recess.

The spider at one end of the shaft and drum is provided with small adjustable counterweights the purpose of which is to balance up the drum so that its center of gravity will coincide with the axis of the spindle at the bearings. This is a matter of importance where accuracy is desired since it is essential that there be no eccentricity of weight in the drum as a whole with respect to its axis of rotation. By the proper adjustment of these counterweights it is possible to so balance the cylinder that it will have no appreciable tendency to turn on its bearings due to slight inaccuracies in the distribution of its weight as originally made up.

The chart of the drum of "Complainant's Exhibit Defendant's Scale" has its abutting edges lapped for a short distance, this being done with extreme care so as to prevent inaccuracies being introduced in the weight scale that is read through the back opening of the casing and also so that all of the price figures may lie opposite the corresponding weight figures, both front and rear. The cylindrical chart so made up is secured to the peripheries of the two end spiders, not by paste as specified in the patent, but by wire staples passing through the chart and through corresponding holes in the flanges of the spider.

The reissue patent in suit falls very far short of describing the cylinder of defendant's device. It specifies thin paper; defendant's drum employs thick paper. It specifies aluminum spiders; defendant's drum employs steel spiders copper plated. The patent says nothing about treatment of the paper; defendant's device employs paper that is treated on both sides to stiffen it and render it of stable character in other respects. The patent specifies that the paper shall be pasted to the spiders; defendant's device secures it thereto by wire staples. The patent says nothing about counterweights; defendant's device employs counterweights for making the center of gravity of the cylinder correspond to its axis of rotation.

Q. 30. Will you please now direct your attention to the cylinder or drum that forms a part of Complainant's Exhibit Cylinder Scale and treat of the same in some such like manner?

A. The cylinder of this scale has three spiders formed of sheet aluminum. Each of these spiders has a hub of brass by means of which the spider is secured to the shaft. Each spider has a flange to which the paper chart is secured.

The paper of which the chart is made is apparently of about

the same thickness and character as the paper of "Defendant's Exhibit Defendant's Untreated Chart Sheet." I have no means available here for accurately measuring its thickness, but as near as I can judge from feeling it is about the same. The chart is treated by an application of moisture-resisting compound on both the inner and outer surface.

The paper forming the chart is attached to the end spiders by a wire which is wrapped about the outside of the cylinder so as to bind the paper to the spider flange. This wire makes one complete revolution around the cylinder, its ends being passed through the paper and the flange of the spider and tied by wrapping it about one of the spokes of the spider. Apparently, in addition to this wrapping of wire the paper is also secured to the spider flange by some sort of adhesive, so as to make a continuous fastening supplemental to the wire wrapping. The paper of the chart does not appear to be glued, pasted or otherwise secured to the center spindle.

Small counterbalance weights of lead are placed on one of the spider spokes at each end of the cylinder, these being in the form of small lead strips secured by bending them around the spokes. These are for the purpose of balancing the cylinder to compensate for inaccuracies in the distribution of its weight, so that it will have no tendency of its own to turn on its bearings.

Q. 31. Please now consider in the same way the cylinder or drum that forms a part of Complainant's Exhibit Complainant's Scale.

A. This, like the cylinder of the scale just described in the preceding answer, has three spiders formed of sheet aluminum. Each of these spiders is provided with a brass hub to facilitate its attachment to the shaft or spindle. Each spider also has a flange upon which the inner surface of the paper chart rests. The spiders of this chart taken from Complain ant's Exhibit Complainant's Scale seem to be somewhat heavier than the spiders of the chart taken from Complainant's Exhibit Cylinder Scale. The thickness of metal of which they are formed is about the same, but the spokes and rims are somewhat wider.

The paper of which the chart is formed is, as nearly as I can tell, of about the same character as that of Defendant's Exhibit Defendant's Untreated Chart. Like the others, it is treated on both surfaces by an application of moisture-resisting compound, to give it the required permanency of character. This paper, as in the cylinder of Complainant's Exhibit

Cylinder Scale, is secured to periphery of the two end spiders by a single turn of wire passing through the flange and tied about one of the spokes at each end. In addition to this, the paper at each end seems to be secured to the spider by some sort of adhesive. The paper does not seem to be secured to the center spider at all.

Four counterweights are applied to the four spokes of one spider at one end of the cylinder, these counterweights being adjustable longitudinally on each spoke so as to provide for the proper balancing of the cylinder.

Q. 32. Can you refer to any record wherein such expedients as you have referred to in describing the cylinders of complainant's scales are represented to be or recognized as being of moment in practice, that is, in the practical uses of cylinders or drums of computing scales, which drums comprise spiders and paper shells?

Mr. Richmond: Objected to as irrelevant, immaterial and incompetent.

A. Yes. I have before me a later patent to Smith, the patentee of the reissue patent in suit, this later patent being No. 674,883, May 28, 1901; and I also have before me a certified copy of the file-wrapper and contents relating to the application upon which this later Smith patent was granted.

A considerable portion of this later Smith patent relates to the details of making up the cylinder, such as the exact method of securing the paper to the spiders and of counterweighting to secure the proper balance of the cylinder. The method of securing the paper to the peripheries or flanges of the spiders by means of the wire wrapping that I have described in connection with the cylinders taken from Complainant's Exhibit Complainant's Scale and from Complainant's Exhibit Cylinder Scale, and the method of counterbalancing the cylinder so as to make its center of gravity coincide with its axis of rotation are described in this patent in detail and specifically illustrated by a number of detailed drawings. The necessity for coating the paper with a moisture-resisting compound is also brought out.

Not only are these features brought out in the patent specification, but there are a number of claims in the patent which cover them in detail. As illustrating this claiming of the specific details of construction of the cylinder employed in Smith's commercial scales, I will point to claims 20, 21, 25 and 26 of this later Smith patent. In these claims Smith specifically recites such elements as "a sheet of light material

provided with a coat of moisture-resisting material," "bands passing around said peripheries of said frame," "a weight adjustably mounted upon said indicator for adjusting the center of gravity of said indicator to coincide with its axis of rotation," and "securing-bands passing around the flexible sheet and having their ends passed through the sheet and secured to the circular frame." I have made these quotations from clauses taken from claims 20, 21 and 25.

In presenting the claims which are now claims 25 and 26 in this later Smith patent, applicant submitted an argument, as shown by the contents of the file-wrapper, under date of December 26, 1900, which points conclusively to the inadequacy of the description of the Smith reissue patent with respect to its disclosing a practical method of making a drum suitable for commercial use. Concerning these two claims this argument states:

"In presenting these two claims we would state that the *formation of the cylinder was one of the greatest practical difficulties* encountered in the practical manufacture of these scales. The difficulties were largely due to variations in temperature and humidity and only after a *long and costly line of experimentation* was it discovered that the edges of the sheet at the ends of the cylinder could be successfully held by passing the ends of the band through to the inside without either distorting the cylinder or causing it to give an incorrect registration with the zero mark on the frame." (Italics mine.)

Thus, according to Smith's own statement, in a later patent, in spite of the disclosure of his reissue patent in suit, the practical formation of the cylinder suitable for commercial use was one of great difficulty, and involved a costly line of experimentation which finally led to the discovery of a suitable method.

Mr. Davis: The certified copy of file-wrapper and contents of patent 674,883 is here offered in evidence and the Examiner requested to mark the same "Defendant's Exhibit File-Wrapper Smith Patent 674,883."

A copy of said Smith patent is also here offered in evidence and the Examiner requested to mark the same "Defendant's Exhibit Smith Patent 674,883."

Mr. Richmond: Objected to as irrelevant and immaterial with respect to the issues involved in this controversy, and also as secondary and hearsay and therefore incompetent.

This objection is intended to apply to the foregoing two exhibits and the preceding testimony relating thereto.

Q. 33. Judging from your study of the scale subject and your general knowledge of mechanics, what do you regard as the function of lightness in these cylinders or drums that you have been considering, such as those which form parts of Complainant's Exhibit Cylinder Scale, Complainant's Exhibit Complainant's Scale and Complainant's Exhibit Defendant's Scale?

A. The main function of lightness is to reduce inertia and to relieve the moving parts of wear and tear, both in operation and in transportation.

Q. 34. What have you to say with regard to lightness of these drums as related to sensitiveness or accuracy in the indications displayed by their inscriptions in connection with suitable indexing means?

A. With properly constructed bearings the weight of the cylinder carrying the indicating inscriptions, has within reasonable limits, very little to do with accuracy or sensitiveness. I have made a series of experiments on a scale employing a drum of the type here under discussion, and have been unable to detect any difference between the sensitiveness and accuracy of the scale when the weight of the drum was greatly added to. I tested the scale having one of these light drums throughout its entire range of capacity and then loaded up the drum by weights so as to give it a total weight approximately two and a half times as great as it had before and made the same series of tests for accuracy without being able to notice any difference whatever in this accuracy. In both cases it was equally accurate so far as could be determined by reading the scale throughout the entire range of its capacity.

Q. 35. Please state how that scale that you tested compared in its general make-up with Complainant's Exhibit Defendant's Scale.

A. It was a scale of the same type in general and I may say the same size and capacity. It had the same general character of drum, but this drum was mounted on more sensitive bearings than those of Complainant's Exhibit Defendant's Scale. The bearings in this case being small ball bearings similar in make-up to those employed in Complainant's Exhibit Complainant's Scale.

Q. 36. Can you state how the drum of the scale that you inspected when its weight had been increased compared in

weight with the drum of Defendant's Exhibit Dayton Cylindrical Scale?

A. The weight of the drum in Defendant's Exhibit Dayton Cylindrical Scale is one pound ten ounces. The drum which I tested with the weights added, weighted slightly less than this, or one pound and six ounces. The weight of this drum in its normal condition without the weights was eight ounces. The character of the tests which I made leaves no doubt in my mind that I could have still further increased the weight of this drum to make it weigh as much or more than the drum of Defendant's Exhibit Dayton Cylindrical Scale without appreciably affecting its accuracy.

It is stipulated and agreed between the parties that defendant's time for completing its proofs be extended a period of fifteen days so as to expire January 31, 1912, and that complainant's time for rebuttal proofs be correspondingly extended so as to begin February 1, 1912, and expire March 2, 1912.

Adjourned until 11 A. M., January 16, 1912.

January 16, 1912, 11:00 o'clock A. M.

Met pursuant to adjournment.

Present:

Mr. Davis, Mr. Richmond, Mr. Scott.

Cross-Examination by Mr. Scott.

XQ. 37. I understand from your testimony, Mr. Miller that you consider that there is no novelty in the feature of patent in suit 597,300, which consists in the idea of providing the casing which encloses the revolving cylinder with a plurality of openings, one in the front and one in the back, and providing the revolving cylinder with two bands of figures, one of which has its numerals inverted so that the reading of the scale can be observed by the customer and dealer at the same time; is this correct?

A. Yes, it is correct to say that I consider that there is no novelty in the feature you mention.

XQ. 38. Did you ever see a scale in which the cylinder bearing the weight and value indications is automatically revolved by the weight of the object placed upon the pan or platform and in which the revolving cylinder did not have a

plurality of skeleton frames of like construction and a sheet of paper surrounding said spiders to form the surface upon which the weight and price indications appear?

A. I am not able to say whether all of the scales which I have seen of the general type you describe were constructed as indicated in your question or not, as I have not been able to see the inside construction of all the scales with revolving cylinders that I have seen. I take it that your question refers to actual scales which I have seen rather than to disclosures in patents and other similar disclosures.

XQ. 39. Did all of the scales of the type referred to of which you have seen the inside construction have the construction described in my last preceding question?

A. So far as I am able to recall they have, barring slight differences in the formation of the end and center spiders in those cylinders having three spiders.

XQ. 40. Then I take it that you have never seen a scale having its weight and price tabulations marked upon a cylinder or cylinders and following the construction as to operating mechanism disclosed in the several patents which you have mentioned on your direct examination, namely, the Pottin patent, 312,014; the Chase patent, 212,789; the Lovell patent, 455,959; the Koch patent 398,625; the Patterson patent, 383,006; the Fuller patent, 585,467, and Carr patent, 468,329.

A. I do not think that the assumption in your question is a proper one because, as I have stated, I have not seen the inside construction of all the cylinder scales that I have seen. Of the scales which I have examined in detail none have had the exact form of cylinder construction disclosed in the Pottin, Chase, Lovell, Koch, Patterson, Fuller and Carr patents mentioned in your question.

XQ. 41. Have any of these scales of which you have seen the inside construction, referring of course to scales in which the cylinder or cylinders are automatically revolved by the weight of the load, did any of them have a plurality of cylinders geared together by spur wheels or sectors or did any of them have a plurality of cylinders mounted upon telescoped shafts and sleeves as shown in the Chase patent 212,789?

A. All of the cylinder scales which I have examined in detail have had but a single cylinder, and therefore no necessity for the gearing by which some of the cylinders had their movements correlated, as in the Fuller patent, for instance, and no necessity for the telescoped sleeve construction by

which some of the cylinders in the Chase patent had their movements correlated. My answer is, therefore, in the negative.

XQ. 42. Will you state how you made your observations as to the sensitiveness and accuracy of the scales with which you experimented, as stated by you in answer to direct question 34?

A. By placing standard weights of known values upon the scale platform and observing the corresponding indications on the cylinder. I applied these weights throughout the entire range of the scale capacity, and made observations reading both forward and backward, that is, with increasing load and diminishing load. I also employed large increments of weight and also very small increments. No difference in sensitiveness or accuracy could be detected in the performance of the scale when the cylinder had its normal weight and when the weight of the cylinder was increased so as to give it a total weight of over two and one-half times its normal weight.

XQ. 43. Did you experiment with the cylinder with its normal weight increased considerably above two and one-half times?

A. In the set of tests which I mentioned in my answer to Q. 34, and in answer to the XQ. immediately preceding this the normal weight of the cylinder was eight and five-eighths ounces, and its weight, as increased, was twenty-two ounces, this being slightly over two and a half times as heavy when weighted as when normal. As that time I made no tests with the cylinder having still further weighting. Since I was asked about this yesterday, however, and since I made the statement yesterday in answer to Q. 36 to the effect that I had no doubt that the weight of the cylinder could be increased still further so as to make it weigh as much as the drum of Defendant's Exhibit Dayton Cylindrical Scale without appreciably affecting the accuracy, I have made such a test with weights added which I understand are sufficient to bring the total weight of the cylinder up to one ponnd and ten ounces, and I find that the statement I made was justified. I could see absolutely no difference between the sensitiveness of the scale as thus weighted and the sensitiveness of the scale in its normal condition.

XQ. 44. Did you experiment with the scale with the weight of its cylinder increased beyond the weight of the cylinder of Defendant's Exhibit Dayton Cylindrical Scale?

A. No, I have made no tests with the cylinder weighted to a still further extent than that described in my last answer. I have no doubt, however, but that the cylinder could be still further weighted to a considerable extent without appreciably affecting its sensitiveness or accuracy.

XQ. 45. Will you state where the weight was added to the cylinder of the scale with which you experimented and of what the weight consisted?

A. The weights consisted of brass cylinders about one inch in diameter, and perhaps five-eighths of an inch in length—I speak without having actually measured their dimensions in inches—and of the necessary screws and washers for attaching them to the spokes of the spider. There were eight of these weights employed, attached one to each of the end spokes of the two spiders, and so located on these end spokes as to not unbalance the cylinder.

XQ. 46. How far were the weights placed from the axial center of the cylinder?

A. Approximately midway between the hub and the periphery. Perhaps a little further out than midway.

XQ. 47. What was the diameter of the cylinder of the scale with which you experimented?

A. A trifle over eight and a half inches, the same as the cylinder in Complainant's Exhibit Defendant's Scale and substantially the same as the cylinder in Complainant's Exhibit Complainant's Scale.

XQ. 49. Will you please measure and state the diameter of the cylinder of Defendant's Exhibit Dayton Cylinder Scale?

A. It is a trifle less than five inches—about four and 15/16 inches, to be a little more exact.

XQ. 50. When the dimensions of a body are increased, the proportions and material being the same in the larger and smaller object, what relation is there between the increase in dimensions and the increase in weight?

A. If the two bodies are exactly similar in all respects, except as to size, and if the increase in size is made proportional throughout the entire body, its thickness being added to in every part proportionally as the length and breadth of the parts are increased, and every part being affected exactly alike in proportion, then the relative weights of the two bodies would be to each other as the cube of any homologous dimension. I think this is the law that is contemplated in your question, but I call attention to the fact that no such

law as this can be applied in any comparison that might be made between the two cylinders whose diameters you have just asked me to compare.

XQ. 51. As a simple illustration of this law will you state what the weight of a sphere of iron 2 inches in diameter will be as compared with the weight of a sphere of iron 1 inch in diameter?

A. If the two spheres are solid then the one 2 inches in diameter will be exactly eight times as heavy as the 1-inch sphere. If the two spheres are hollow, with the same thickness of wall in each case, then the 2-inch sphere would weigh about four times as the 1-inch sphere, assuming the wall to be thin.

XQ. 52. Applying the law which you stated in answer to XQ. 50 and accepting the statement of the law as you there made it, will you please state the weight of a cylinder like that of Defendant's Exhibit Dayton Cylinder Scale and having a diameter of a little over eight and a half inches? Of course, my question is based upon the law as you defined it and upon the assumption that the materials used are to be the same as those entering into the construction of the cylinder of Defendant's Exhibit Dayton Cylinder Scale.

A. This comparison is, of course, an absurd one to make, if it is to have anything to do with the comparison of the two cylinders in question, and even as you have stated it, it must be remembered that the length of the cylinder will have to be increased in the same proportion as the diameter, thus making it much longer than any of the scales in any of the exhibits in this case. If, however, the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" were to be increased from its present dimension of, say, 5 inches in diameter to a dimension of, say, 8½ inches, and if the length of the cylinder were increased in similar proportion, and if the thickness of the paper covering, of the shaft of the spiders, and, in fact, every dimension of every part were increased in similar proportion, then the weight of such a cylinder would be 127.738 ounces, instead of 26 ounces, its present weight. This cylinder would be approximately 22½ inches long instead of 13¼, and all of its other dimensions, including the thickness of its material, would be in like proportion.

Recess.

XQ. 53. Will you state what the weight would be of the 8½-inch cylinder referred to in the previous question and answer, if its length were reduced to the length of the cylinder

of the scale with which you experimented as set forth in your answer to Q. 34, it being assumed that all other dimensions and proportions of the enlarged cylinder remain as set forth in the previous question and answer?

A. Am I to understand that the cylinder which you now propose is the one which I figured in the last answer, but merely shortened, as by sliding the heads together on the shaft, cutting off the shaft and the paper tube, but leaving all dimensions otherwise the same?

XQ. 54. Your understanding is correct.

A. It is impossible to answer this accurately, because its weight under this treatment will not vary proportionately with the length. I may say, however, that this shortening of the cylinder would result only in a few ounces decrease, since the only material cut out would be a short section of the shaft or spindle and a short section of the paper.

XQ. 55. Have you any way of ascertaining approximately the weight of the shaft of the cylinder of "Defendant's Exhibit Dayton Cylinder Scale"?

A. Yes, I can easily figure the weight of this shaft from its cubical contents and the known weight of steel rods per cubic inch; or I can arrive at it approximately by weighing the shaft and one of the spiders which seems to be permanently attached to it, and deduct the weight of the other spider on the assumption that the two spiders weigh approximately the same, as they probably do. But please permit me, as possibly saving time, to call your attention to the fact that this shaft of the drum, "Defendant's Exhibit Dayton Cylinder Scale," is not the one treated of in my answer to XQ. 55, because in that answer, in response to the terms of the question on which it is based, the shaft itself has been increased in diameter.

XQ. 56. I would like to have you, if you will, state the approximate weight of the shaft of the cylinder of the "Defendant's Exhibit Dayton Cylinder Scale," understanding, of course, the distinction you have made.

A. I find, upon weighing the shaft with attached single spider, that the combined weight of the spider and shaft is thirteen ounces; and that the weight of the other spider, which is free from the shaft, is about nine and one-quarter ounces. Subtracting this figure representing the detached spider alone from the weight of the other spider with the shaft attached, I arrive at a figure of three and three-quarter ounces as being a close estimate of the weight of the shaft alone of the cylin-

der of "Defendant's Exhibit Dayton Cylinder Scale." This is probably sufficiently accurate for the purposes of your question.

Since making this statement I have secured a pair of pliers, by means of which I have been able to detach the other spider from the shaft, and on weighing the shaft alone I find its weight to be three and one-half ounces, which checks fairly well with the rougher method employed in the previous portion of the answer.

XQ. 57. From your answer to the preceding question it appears, then, that the shaft of the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" weighs about one-seventh of the entire cylinder structure, including the shaft. If this estimate of the relative weight of the shaft to the entire cylinder structure, including the shaft, is correct, will you state, if you can from the information at hand, what relation the weight of the shaft of the cylinder scale with what you experimented as set forth in your answer to Q. 34 and succeeding questions, bore to the entire weight of the cylinder, including its shaft?

A. The weight of the shaft alone of "Defendant's Exhibit Dayton Cylinder Scale" is a little less than one-seventh of the total weight of the cylinder, and I presume that a statement that it is one-seventh is close enough for your purposes. I now understand you to ask what proportion the weight of the shaft of the cylinder which I experimented with, as described in my answer to Q. 34, was of the total weight of the cylinder, including the shaft. I did not weigh the shaft alone of the scale with which I experimented, but as it was of the same diameter as the shaft of "Defendant's Exhibit Dayton Cylinder Scale," and a trifle longer, I think that I am safe in saying that its weight was very close to three and one-half ounces. As the total weight of the cylinder, including the shaft, was twenty-two ounces—this with the weights added—it is apparent that the shaft alone weighed a little less than one-sixth of the combined weight of the shaft and cylinder.

XQ. 58. How much did the cylinder and shaft of the scale with which you experimented weigh in their normal condition, that is, without the extra weight which you added?

A. The weight of the complete cylinder with its shaft and pinion, ready to go into the scale, was eight and five-eighths ounces. This was in its normal condition, without the extra weights put on for the purpose of the tests I mentioned.

XQ. 59. Do you understand that the weight of the revolving cylinder in scales of the general type of "Complainant's Exhibit Defendant's Scale" is related to the utility and operativeness of the scale in any way?

A. Yes.

XQ. 60. In what respect does the weight of the cylinder enter into the operativeness or utility of such a scale?

A. The weight of the cylinder enters into the operation of the scale principally in considering the inertia of the chart and associated moving parts. The lighter the cylinder, the quicker it will respond to the forces tending to turn it, and the quicker it will come to rest at the desired spot. This matter of inertia also affects largely the wear and tear on the parts associated with the movement of the cylinder, not only during use, but during transportation. Lightness of the cylinder is desirable, therefore, from the standpoint of small inertia, so that it can be moved quickly by small forces and be brought to rest quickly upon the cessation of such forces, and because of the decreased strain that is brought upon it and the associated parts by the throwing of a weight suddenly upon the platter or platform, or by sudden jars due to other causes. With properly constructed bearings for the spindle of the cylinder the weight of the cylinder, within reasonable limits, has very little to do with the accuracy, as I have proven by the experiment referred to.

XQ. 61. The inertia of two cylinders of equal weight, that is, the inertia which they have relative to a rotary movement upon their axes, is related, is it not, to the distribution of weight, that is, if the larger part of the weight of one of the cylinders is near its periphery, its inertia will be greater than that of the other if the weight of the other is largely concentrated near its axis; is this correct?

A. Yes, the inertia of a cylinder with respect to rotary motion on its axis is greater if the mass and weight of the cylinder are largely concentrated near the periphery than it would be if largely concentrated near the axis of rotation.

XQ. 62. In the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" there is relatively a larger part of its weight near the periphery, is there not, than in the cylinder of the scale with which you experimented, as stated in answer to Q. 34 and succeeding questions; I refer to the scale with which you experimented in its normal, commercial condition?

A. It is difficult to answer this question off hand, but I think there is not much difference between the two cylinders

in the relative distribution of weight in the respect mentioned in your question. Without having the figures accurately before me I believe that the paper chart forming the periphery of the cylinder of the commercial scale which I tested weighs, with its moisture proof coatings, about one-quarter of the entire cylinder with its shaft. I find that the paper cylinder of "Defendant's Exhibit Dayton Cylinder Scale" weighs four ounces, and this is somewhat less than one-seventh of the total weight of that cylinder and its shaft. This is not quite a fair comparison, because I think the rims of the cast iron spiders of the "Defendant's Exhibit Dayton Cylinder Scale" are probably somewhat heavier in proportion to the rest of the spider than is the case with the very light spiders employed on the cylinder of the scale which I tested. I doubt, therefore, if it can be said that the proportion of the weight which is concentrated near the periphery of "Defendant's Exhibit Dayton Cylinder Scale," with respect to its total weight, is any greater than the proportion of the weight near the periphery of the scale which I tested, with respect to its total weight.

XQ. 63. You have found that one of the end pieces or spiders of "Defendant's Exhibit Dayton Cylinder Scale" weighs nine and one-quarter ounces, and I find that the other weighs approximately the same. Is not all of the weight of these end pieces or spiders at such a distance from the axial center of the cylinder as to contribute to the inertia of the cylinder to a greater extent than the same weight would if occupying the central position, where the shaft is?

A. Certainly.

XQ. 64. Will you please compare the weight of the end pieces or spiders of "Defendant's Exhibit Dayton Cylinder Scale," such weight amounting altogether to approximately eighteen and one-half ounces, with the weight of the spiders supporting the cylindrical shell of the cylinder of the scale referred to by you in answer to question 34, and succeeding questions?

A. I believe that the weights of the spiders on the scale which I tested was one ounce each, this being the weight of the spider with its hub; there being three of these spiders, this would make the total spider weight about three ounces. The weight of the two spiders together of the "Defendant's Exhibit Dayton Cylinder Scale" I find to be almost exactly nineteen ounces, so that the spiders of this exhibit cylinder weigh a little over six times the weight of the spiders in the

cylinder which I tested. I call attention, in this connection, to the fact that the weight of the very light spiders of this cylinder which I tested is also at such a distance from the axial center of the cylinder as to contribute to the inertia of the cylinder to a greater extent than the same weight would if occupying the central position where the shaft is.

XQ. 65. Can you state about what the weight was of the paper shell or outside part of the cylinder of the scale with which you experimented?

A. Not accurately, as I did not measure it; but undoubtedly in the close neighborhood of two ounces.

XQ. 66. Then, to summarize, in the cylinder of the scale with which you experimented there was altogether about five ounces of weight located farther from the axial center of the cylinder than the shaft of the cylinder, while in the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" there is about twenty-three ounces of weight located farther from the axial center of the cylinder than the shaft, in both instances the weight being distributed between the shaft and the periphery; is that correct?

A. That is approximately correct as stated, with the understanding, of course, that the weight between the shaft and the periphery is not uniformly distributed, there being very much more weight between the shaft and the periphery in the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" than in the cylinder which I tested, in its normal condition. In other words, in the cylinder which I tested the great bulk of the weight lies either in the shaft or in the periphery, while in the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" a much larger proportion of the weight lies within the periphery.

XQ. 67. The shocks due to the inertia of the rotating cylinder in scales of the character we are discussing would tend, in the case of cylinders of considerable weight, to impose a considerable strain and wear upon the mechanisms through which the weight of the substance being weighed is communicated to the cylinder, in the case of the scale you experimented with a rack and pinion being used for the purpose of transmitting the force from the article weighed to the cylinder. Do you understand this to be the case?

A. Yes, as I understand your question. In the scale which I tested a rack and pinion was a part of the mechanism by which the weight being weighed transmitted its motion to the cylinder; and undoubtedly, other things being equal,

a cylinder of light weight constructed with a view to having small inertia would impose less of a strain and less wear and tear on this rack and pinion and associated parts than would a heavy cylinder constructed to have a relatively great inertia.

XQ. 68. You have testified regarding accurate results obtained in the use of a cylinder scale in which you added weights to the cylinder until it weighed one pound and six ounces. Do you know of any scale of this character having a cylinder of that weight having been put into commercial use and having resisted the wear and tear of everyday use for any considerable length of time, or having been put into commercial use at all? By commercial use I mean sold by the manufacturer to a merchant or other person having use for scales, and used by the latter in his regular course of business?

A. I do not, assuming that you mean by "scale of this character" one wherein the cylinder is automatically moved.

XQ. 69. Referring to British patent to E. W. Wise, No. 678, of 1895, which you mentioned in your direct testimony, will you please explain briefly how the cylinder forming part of the scale illustrated, is rotated, that is, where the force comes from that rotates it?

A. The force for rotating the cylinder in this patent is supplied by the operator of the scale. Turning the hand wheel J revolves the cylinder and also through the gear K and pinion L turns the worm M and moves the counterweight Q along the scale beam until the proper balance is secured.

XQ. 70. In this scale of the Wise patent there is no communication of force from the object placed upon the scale to the cylinder, is there?

A. No. On the contrary, the cylinder is turned by hand.

XQ. 71. The sensitiveness or accuracy of the scale of the Wise British patent is not in any way related, is it, to the weight of the revolving cylinder?

A. As the cylinder in this Wise patent is mounted on the scale-beam and movable with it, Wise undoubtedly wished to get a cylinder of light construction, so as not to load his scale-beam up beyond a reasonable limit. It is true, however, as you say, that any reasonable varitaion in weight of this Wise cylinder would not materially affect the accuracy of the scale.

Adjourned to 10 o'clock, January 17, 1912.

January 17, 1912, 10 o'clock A. M.

Met pursuant to adjounrment. Present: Mr. Scott and Mr. Davis.

XQ. 72. Will you read questions 57 and 58, and the answers thereto, and state what fractional part of the weight of the shaft and drum of the scale, the drum being in its normal or commercial condition, the weight of the shaft was?

A. The shaft, as I stated, weighed about three and one-half ounces, and the complete cylinder, including the shaft in its normal condition, weighed eight and five-eighths ounces; the shaft, therefore, weighed approximately 40 per cent of the total combined weight of the shaft and cylinder.

XQ. 73. You have found, as stated in your answer to XQ. 62, that the paper cylinder of "Defendant's Exhibit Dayton Cylinder Scale" weighs four ounces. Will you state what the weight of the cylinder would be if its diameter were increased to 8½ inches, the thickness of the paper and all other dimensions being proportionately increased?

A. The terms of your question, of course, would increase the length of the cylinder as well as its diameter and thickness. This brings the question within the rule concerning the cube of homologous dimensions. If, therefore, the diameter of the paper tube were increased from 5 to 8½ inches its length and thickness being increased in like proportion, and the character of its material remaining the same, then the paper cylinder would weigh 19.652 ounces.

XQ. 74. From the figures given in your last answer can you compute the amount which the shortening of the cylinder referred to in your answer to XQ. 54 would reduce the weight of the paper cylinder? In your answer to XQ. 52 you stated that if the diameter of the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" were increased to 8½ inches and all other dimensions, including length of cylinder, were proportionately increased, the total weight would be 127.738 ounces, and my question is directed to ascertaining the weight of this enlarged cylinder, if its length were reduced to the length of the cylinder of the scale with which you experimented, such reduction in length to be effected by shortening the shaft and paper cover by cutting them off and sliding the cast iron heads together on the shaft.

A. Yes. With the cylinder increased in all its dimensions proportionately, it would have a length of 21.89 inches in-

stead of its present length of 12⅞ inches. This refers to the paper cylinder alone. If now the paper cylinder were to be left of the increased diameter and thickness prescribed in your question immediately preceding this one, but were to be cut back in its length to 12⅞ inches, its weight would be decreased in direct proportion so that instead of weighing 19.65 ounces it would weigh approximately 11½ ounces.

XQ. 75. In your answer to XQ. 56 you stated that the shaft alone of the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" weighed three and one-half ounces. Assuming that all of the linear dimensions of this shaft are increased in the ratio of five to eight and one-half, what would its weight be?

A. 17.19 ounces.

XQ. 76. What would the length of the shaft of "Defendant's Exhibit Dayton Cylinder Scale" be if increased at the ratio of five to eight and one-half?

A. Its present length is 14½ inches, its increased length would be 24.65 inches.

XQ. 77. Taking this hypothetical shaft of the length of 24.65 inches and cutting it off to a length equal to that of the shaft of the cylinder of the scale with which you experimented, what would its resulting length and weight be?

A. Its resulting length would be 14½ inches, but it would still be of increased thickness; its resulting weight would be 10.1 ounces.

XQ. 78. Do you find in any of the patents to which you have referred during your deposition any instance in which the necessity or desirability is mentioned of providing a light weight construction for the revolving cylinder in weighing scales in which the weight of the object being weighed is the force through which the revolving cylinder is automatically rotated to register weights and values?

A. Several of the patents will show cylinder scales with revolving drums automatically moved by the weight of the article to be weighed and show in their drawings drums of cylinders of light construction. The patent to Phinney and that to Babcock show light hollow drums. I do not find that any of the patents showing this type of cylinder scale specifically mentions the necessity for lightness.

XQ. 79. Prior to your being called upon to testify in this case had your attention ever been directed to weighing scales in any other way than possibly as an occasional user of such articles?

A. I have used scales of various types nearly all my life. I think, however, that, if your question is directed particularly to computing scales of the general type referred to in this case, I never particularly studied them until called upon to investigate them in connection with this suit. My observation of them before that time had been of a casual nature.

XQ. 80. Referring to claim 2 of patent 597,300 in suit, which of the structures shown in patents referred to by you or otherwise referred to by you as existing prior to July 30, 1897, do you consider shows to the greatest extent the mechanical elements and principles set forth in that claim?

A. The feature of the claim relating to the revolving drum with inverted columns of numerals, with provision for front and back reading through openings in the front and rear of the casing is almost equally well set forth in such patents as those to Fuller, Chase, Pottin and Koch. As to the general character of the scale contemplated in this claim there is little choice between the disclosure of the patents to Phinney, applicant's own reissue patent and the patent to Babcock, for instance. As to the minutiae of the claim relating to the exact character of the covering for the opening, consisting of transparent material having stationary pointers thereon, I referred to a number of patents between which there seems to be little choice. Smith's own reissue patent has an opening fitted with glass, with indicating figures marked or inscribed directly on it, but really I would not know how to pick out any one of these patents as being the best. It has been my effort in this deposition to disclose the state of the art, and it seems to me that it is a matter for the court to decide such matters as are asked in your question, as to which portion of the art is most pertinent.

Redirect Examination by Mr. Davis.

RDQ. 81. Referring to the disclosure in the Smith reissue patent of glass over the reading opening, as mentioned in your last answer, will you please point out with greater particularity just what the disclosure in this respect is upon the drawings and in the specification of that reissue patent?

A. Referring particularly to Fig. 4 of the Smith reissue patent, which shows a cross-section of the cylinder casing, an opening *t'* is shown at the extreme right of this figure in the casing *a;* this opening is fitted with a glass pane *u'*, as

clearly shown in cross-section in that figure. A front view of this opening and its glass covering *u'* is shown in Fig. 1, it being seen that the opening extends entirely across the face of the cylinder. Concerning this the patent says, beginning line 60, page 2:

"*t'* is an opening in the face of the casing *a*, within which is fitted a glass *u'*, through which may be seen the figures on the periphery of the drum. The glass *u'* has printed or suitably inscribed thereon a series of figures *v'* which register with the columns of figures *s'* and indicate various prices per pound."

These figures *v'* are the lower row of figures shown on the front view of Fig. 1, and as stated, are inscribed directly on the glass. The row of figures *s'* shown immediately above this lower row on Fig. 1, are the price figures on the drum, which are seen through the glass. The centrally disposed figure represented by *r'* is also on the drum, and is one of the row of weight indications. While the patent does not describe the horizontal and vertical lines which appear on the face of the glass window, as seen in Fig. 1, I merely call attention to them as they appear on that figure.

RDQ. 82. What should you say that the illustration of the horizontal line in Fig. 1 just above the price per pound numerals and the inscription "P. Oz." would denote as to the manner of creating such a line in association with the glass and the inscriptions thereon?

A. I would naturally infer that the horizontal line to which you refer was printed or inscribed on the glass in the same manner as the price figures and the abbreviations "P." and "Oz.," which the patent says are printed on the glass. This line would form a datum line to mark the lower side of the monetary and weight figures on the revolving chart to be viewed through the opening.

That there may be no doubt about the figures representing price and weight which are on the drum being viewed through the glass, I call attention to the paragraph of the patent, which begins on line 83, page 2, which refers to Fig. 5, which is a detail of the price and weight figures on the drum. This paragraph refers to the broad, straight line *w'* extending across the face of the drum, as being intended "to show through the glass *u'* when the scales are at rest and at a balance of zero." That this line *w'* on the cylinder is not the horizontal line that appears on the glass in Fig. 1, is evident from the fact that the cylinder in that figure is shown

rotated out of its zero position to a position indicating three pounds. As the chart has no other horizontal lines upon it, the only interpretation of the horizontal line across the center of the glass in Fig. 1 is a stationary datum line, presumably marked directly on the glass, as are the lower row of figures.

RDQ. 83. To what extent do you consider that the disclosure in reissue 11,536, discussed in your last answer, responds to the recital in claim 2 of patent in suit, 597,300—"the openings in the opposite sides of the casing being covered with transparent material having stationary pointers thereon."

A. I think it responds completely to the recital of one of such openings as is indicated by the language you quote; unless there is to be some quibble about whether a line extending clear across the glass was a "pointer."

RDQ. 84. Do you think that the apparent thickening of the line at its middle, as shown in Fig. 1 of the reissue patent has any significance?

A. I can only surmise as to this. I think it likely that this thickening of the line across the part of the opening through which the weight figures on the drum are viewed is for the purpose of making a pronounced indication at that point of the point on the scale at which readings are to be taken.

RDQ. 85. Having reference to the comparative merits of datum lines marked upon glass and reading lines supplied by a wire mounted independently of the glass, and more particularly the subject of difficulties in correct locations of datum lines marked upon glass as referred to in a previous portion of your deposition, I wish you would look at "Defendant's Exhibit Smith Patent 674,883," and "Defendant's Exhibit File-Wrapper Smith Patent 674,883," and state whether these exhibits present anything, and if so what, bearing upon this matter.

A. This later Smith patent shows a glass opening carrying a datum line or pointer, which is well shown in Fig. 14, the datum line being indicated at 41. Means are provided in this patent for adjusting this datum line up and down so as to make the datum line register properly with the zero line on the cylinder when in its zero position. The necessity for doing this exemplifies the statement which I made in my direct examination as to the advantage of the stretched wire datum line over the datum line on glass, the stretched wire

avoiding all difficulties of alignment, and making unnecessary any accurate adjusting of the glass. Referring to this feature applicant in his amendment dated April 24, 1900, as shown by the file-wrapper, stated:

"This is a detail of construction developed by perfecting this type of scale and serves a most useful function in enabling the scale to be manufactured to a standard in quantities and subsequently scaled or adjusted individually with the greatest accuracy and with the minimum labor."

RDQ. 85a. What should you say the natural thing would be for a mechanic to do if the cylinder of "Defendant's Exhibit Dayton Cylinder Scale" was handed him and he was instructed merely to produce a cylinder like it except increasing the diameter from 5 inches to 8½?

A. The natural thing for any mechanic to do would be merely to increase the length of the spokes in the spiders so as to make a resulting casting of the larger diameter required, and to wind his paper cylinder to that diameter, without increasing its thickness. To assume that he would increase every part and every dimension in exact proportion to the increase of diameter is to assume something that would probably never occur to him because absolutely unnecessary.

RDQ. 86. Will you please state whether or not the copper-plated scale that is here present is the one upon which the tests were conducted that you were cross-examined about, that is, tests with and without weights mounted upon the drum or cylinder

A. It is.

RDQ. 87. Have you similarly tested or witnessed similar tests upon a scale like this copper-plated scale except for the absence of ball bearings in which the trunnions of the drum revolve, in other words, like "Complainant's Exhibit Defendant's Scale," in the matter of cylinder bearings as well as essential make-up throughout; and if so, with what result?

A. I have weighed various articles on another scale which is here in the room, and which bears a manufacturer's number, 89,437, but have not made such a careful series of tests as I made on the other scale with the ball bearings, and concerning which I have testified. This scale has now on it, and has had on it during the various uses that I have made of it, a set of weights similar to those which I used in weighting the cylinder in the tests I made. The cylinder of this scale

is mounted on roller bearings, rather than ball bearings. It has always appeared sensitive and accurate, so far as I have been able to observe it. I believe that in all essential respects this scale is the same in character as the one I tested, with the exception of the roller bearings instead of the ball bearings. I believe that the character of the cylinder is the same in all respects as the one I tested. This scale is also the same in all essential respects as the scale here in evidence, which is marked "Complainant's Exhibit Defendant's Scale," this latter scale also having roller bearings.

RDQ. 88. In testing of the ball-bearing scale and the uses you have made or observed of the gold-finished scale 89,437, was there uniformity in indications when the cylinders of these scales were carrying the weight by which to more than double their normal weight, in instances where the same load was replaced upon the platform.

A. Yes, remarkable uniformity for weights throughout the entire range of the capacity of the scale.

RDQ. 89. Will you state whether in the specification of the reissue patent in suit 11,536, there are any directions as to formation of the spider arms to preserve lightness without sacrificing stability?

A. None whatever.

Mr. Davis: The Examiner is requested to mark for identification the copper-plated and gold-finished scales above referred to as follows: "Defendant's Exhibit Demonstrating Scale No. 1," and "Demonstrating Scale No. 2." There will be identified in connection with the deposition of another witness and then formally offered in evidence.

Deposition closed.

KEMPSTER B. MILLER.

Recess.

CLARENCE H. HAPGOOD, a witness called on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Davis.

Q. 1. Are you the same Clarence H. Hapgood who previously testified in this case?

A. Yes, sir.

Q. 2. I wish you would state about when and under what circumstances you first became familiar with the hanging cyl-

inder computing scale, a specimen of which is in evidence as "Complainant's Exhibit Cylinder Scale."

A. The first scales I saw of this type were scales which were brought over to the department of which I had charge at the Dayton Computing Scale Company, either the latter part of 1899 or the early part of 1900. These scales were some that were sent in from the East, and most of them bore the mark of being made by the Boston Computing Scale Company.

Q. 3. How did those scales just referred to compare in construction with "Complainant's Exhibit Cylinder Scale," particularly with respect to the indicating cylinder or drum?

A. As far as the indication is concerned, it was very similar, having a cylinder very much the same as the one in this exhibit, but these scales had no air tubes for stopping the oscillation of the chart, neither did they have thermostats, as this scale has which is in evidence.

Q. 4. I hand you the cylinder of "Complainant's Exhibit Cylinder Scale," and will ask you to state how the cylinders of those Boston scales you refered to compared in construction with the same.

A. On some of the scales the weight indications for showing weight to the operator and also the customers, instead of being central of the chart, were at either end, while none of the charts in these old scales had the wire which holds the paper of the chart down to the chart frame. Otherwise the construction was very similar.

Q. 5. Do you recall the manner in which the chart had been attached to the spiders in those scales that you have mentioned, and whether said scales bore evidence of efficiency or lack of efficiency of the means employed to fasten the chart to the spiders?

A. In one or two of these scales which I hung up on the testing hook to test them out, I found that in revolving the cylinder the paper of the cylinder struck on the inside casing of the scale; upon taking these scales apart I found that the paper, which evidently had been pasted to the chart frame had become unpasted in places and allowed the chart paper to push outward, which caused the scale to bind.

Q. 6. What was the character of the chart in those scales that you first saw, that is, of what sort of material were they composed, and how, if at all had that material been treated?

A. The chart paper itself had been treated inside and out with a resinous varnish. The reason I know these charts

were treated with a resinous varnish is because a great many of the charts had turned very yellow, which is a fault of varnishes which contain rosin.

Q. 7. How about the matter of balance of the cylinders in those scales that were brought to you; were means employed to secure a proper balance?

A. The only method that I could see that these charts had of being balanced was by putting small pieces of lead on the arm of the spider frame.

Q. 8. What was the occasion for those scales being brought to you in the factory of the Dayton Computing Scale Company?

A. As stated previously, these scales, about twenty in number, were brought over to my department and set right in the middle of the floor. I asked the superintendent, Mr Mellinger, what was to be done with them, and he said he did not know. Until finally one day Mr. Ozias came into the department, and I asked him. "Well," he says, "you can put them under the bench out of the way for the present," but he says, "I want you to become familiar with the construction, because we may manufacture scales of a similar type." Those may not be the exact words that Mr. Ozias uttered, but are the sum and substance, as near as I can recollect.

Q. 9. Were you called upon thereafter to do any work in connection with scales of that type, and if so, what?

A. Not until some time after that, because after they began selling this hanging butcher's scale similar to the one on exhibit, these scales were manufactured at the Dayton Company's Saugatuck factory and shipped to Dayton for reshipment to customers.

Q. 10. Did you have occasion to examine any of these hanging butcher's scales so manufactured at Saugatuck and sent to Dayton?

A. I did. Because a great many of them upon being unboxed we found that they had to be readjusted before they could be reshipped.

Q. 11. In what respects, if any, did these scales made at Saugatuck for the Dayton Company differ from the scales of the same general type that you had first seen?

A. They differed from the fact that the cylinders were made a trifle longer, the front and back indications to indicate weight were all in the center. A neater sight opening was worked out to read the values and the weight from the operator's side. Scales which were sent on later from the Sauga-

tuck factory were equipped with air tubes to check the vibration of the chart.

Q. 12. In what manner was the chart itself secured to the cylinder frame in these later scales that came from Saugatuck?

A. The bearing ends of the chart shaft were pivoted in plain bronze bushings or castings.

Q. 13. You misunderstood my question, which related to the manner of securing the paper chart to the spiders or frame of the cylinder.

A. In these later scales which came from Saugatuck, the chart paper was held to the chart spiders by means of a wire.

Q. 14. Would you say that "Complainant's Exhibit Cylinder Scale" corresponds throughout with these later Saugatuck scales in the form, arrangement and material of the several parts?

A. The only difference that I can see in the general scale construction is that the exhibit scale was a thermostat, while the earlier ones which were shipped from Saugatuck had not.

Q. 15. How does the cylinder itself of this exhibit scale compare with those of the later Saugatuck scales you mentioned?

A. The construction is identical, as near as I can see.

Q. 16. What were you eventually called upon to do with respect to this type of scale?

A. We were called upon to assemble it in the department of which I had charge.

Q. 17. Was the manufacture of that type of scale being carried on at the factory of the Computing Scale Company in Dayton then, that is, when assembling was going on in your department?

A. They had started about this time to make tools for producing this same scale at the Dayton factory.

Q. 18. Did you ever have occasion while employed by the Dayton Company to test the hanging butcher's scale for accuracy or take up the subject of the improving or refining it?

A. I had more occasion for testing them than I had time to devote to them, because in addition to being foreman of the department they expected me to devote all my spare time to the inspection of scales, to help out our regular inspection.

Q. 19. How did these scales of the hanging or supension type like "Complainant's Exhibit Cylinder Scale" show up under the testing for accuracy?

A. Why, a great many of these scales would show, say, from a quarter to a half an ounce or friction, that it was impossible in a great many cases to work this friction out. But any ordinary reader of the scale would readily say that the scale weighed correct, or had no friction, due to the fact that the graduations on the chart which designated the pound and ounce spacings were nearly as wide as the spaces allotted to the chart to register one ounce. In addition to this the device for reading the weight indication was as wide as the space between the indicated ounce graduations. So that it would be admost an impossibility to get a correct reading of the scales.

Q. 20. Do you find this same sort of marking upon the cylinder of "Complainant's Exhibit Cylinder Scale," and the same character of reading device or pointer referred to in your last answer?

A. I do.

Q. 21. Were the cylinders of those scales that you inspected and tested as light in weight as the cylinder of "Complainant's Exhibit Cylinder Scale"?

A. There was no difference in construction or weight from the cylinder of the exhibit scale referred to.

Q. 22. Will you please weigh the cylinder of "Complainant's Exhibit Cylinder Scale" upon either "Defendant's Exhibit Demonstrating Scale No. 1" or "Defendant's Exhibit Demonstrating Scale No. 2," and state what it weighs?

A. Exactly eight ounces.

Q. 23. What should you say was the reason for the friction in those scales that you inspected and tested which caused the inaccuracy of a quarter to half an ounce?

A. Because of the bearings on which the chart shaft was mounted.

Q. 24. What sort of bearings were there in those scales?

A. On either end of the frame of the scale was a bronze casting which had a hole in the same, through which the journaled ends of the chart shaft revolved.

Q. 25. Do you find the same sort of bearings for cylinder in "Complainant's Exhibit Cylinder Scale"?

A. The bearings are identical in construction.

Q. 26. Do you know of any efforts made in the Dayton factory to correct the inaccuracies of the scales such as "Complainant's Exhibit Cylinder Scale"?

A. There was no effort made until they made the platform cylinder scale.

Q. 27. Do you refer to the same general type of scale as

that represented by "Complainant's Exhibit Complainant's Scale"?

A. Yes, the same general type.

Q. 28. Did you have anything to do with the development of the Dayton platform cylinder type of scale?

A. I was called into their experimental room for a matter of two or three weeks to make some changes in the English hanging scale, and at this time they were making some changes in this platform cylinder scale, and I was frequently called upon to help them assemble it and tear down same, and help them make changes.

Q. 29. About when was this that you were assigned to the experimental work which you speak of?

A. Shortly after my return from England for the Dayton Company, in May, 1902.

Q. 31. Did you then have occasion to examine and test platform cylinder scales that were on hand in the Dayton factory?

A. I did, yes, sir.

Q. 32. What was the nature of the work that you were called upon to do in the exeprimental department, either in reference to the platform cylinder scale or the English hanging scale?

A. On the platform cylinder scale I helped them make the changes from one chart to another and adjust the scales after these different charts were substituted, as they were trying out experiments with pinions of different diameters on the cylinder, and also pinions of different pitch.

Q. 33. What was the reason for these changes being made?

A. Because the scale showed too great a friction.

Q. 34. To what extent was the platform cylinder scale that you were then trying to improve, inaccurate, due to friction?

A. You could hold it off at some points nearly an ounce.

Q. 35. Was the same sort of cylinder used in those inaccurate platform cylinder scales that had been used theretofore in the hanging type of scale, that is, cylinders like that of "Complainant's Exhibit Cylinder Scale"?

A. The chart construction was the same with the exception that the pinions used on the platform cylinder scale, the teeth were a little finer.

Q. 36. How about the matter of weight; was the cylinder of the platform cylinder scale as light as the cylinder of the hanging scale?

A. There would be no difference in weight unless it was a slight difference which the difference in the pinions would have made, which would have been only a fraction of an ounce.

Q. 37. Why was it that the platform cylinder scale with a cylinder or drum as light as that employed in the hanging scale showed a greater inaccuracy than the hanging scale?

A. It would naturally show more friction, due to the fact that the error would be multiplied by the introduction of several other bearings.

Q. 38. Do you here refer to the lever and platform bearings and connections from the lever to the cylinder?

A. I do.

Q. 39. What was the reason for using a different pinion in the platform cylinder scale from that used in the hanging scale?

A. Because we had already been making automatic spring scales of a different type at the Dayton factory, and we had found through experiments that a 32-pitch rack and pinion was more satisfactory than the coarse one, which was made in the Saugatuck hanging scale.

Q. 40. Was there any attempt made to cure the inaccuracy of the platform cylinder scale by making the cylinder lighter than the cylinder that had been employed in the hanging scale?

A. Not to my knowledge.

Q. 41. What was done in an effort to cure the inaccuracy of the platform cylinder scale?

A. The introduction of ball bearings, into which the bearing ends of the cylinder were mounted.

Q. 42. Was this character of bearing thereafter adopted by the Computing Scale Company of Dayton, in its platform cylinder scales?

A. Yes, sir, they couldn't make them fast enough.

Q. 43. Please look at "Complainant's Exhibit Complainant's Scale," and state whether you find therein bearings of this sort for the rotating cylinder or drum.

A. The construction is very similar to what was first used.

Q. 44. Did the adoption of ball bearings such as in "Complainant's Exhibit Complainant's Scale," serve the purpose of curing the inaccuracy you mentioned?

A. It did.

Q. 45. Was this improvement carried into the hanging scale?

A. Not during the period of time that I was with the Dayton Company.

Q. 46. Then the hanging scale continued, did it, to be inaccurate from a quarter to a half ounce, due to friction in the bearings?

A. Yes, sir; they never done anything to it to make it any better.

Q. 47. In your previous deposition you testified to some extent with reference to the development of the Toledo Company's platform cylinder scale, and certain materials employed in the construction of the revolving cylinder or drum thereof. I will ask you now to state what this chart which I hand you represents in that regard.

A. It represents a printed chart just as it comes from the press, only that the edges have been trimmed. It is a chart for the construction of a computing cylinder in the Toledo cylinder scale.

Q. 48. Does this represent the standard grade and character of material regularly employed by the Toledo company in the construction of its computing cylinders?

A. Yes, sir.

Q. 49. How does it compare with the cylindrical portion of the drum in "Complainant's Exhibit Defendant's Scale"?

A. The sheet of paper is the same size as the one already made up on the drum.

Q. 50. Should you say that it is of the same thickness and texture as that in the drum of said scale?

A. I should say it was, from the fact that we have never changed either the weight of the paper or the quality used in the Toledo scale since we began manufacturing them.

Q. 51. How is that material known in the trade, by what name?

A. Scotch linen ledger.

Mr. Davis: The chart sheet in question is now offered in evidence as "Defendant's Exhibit Defendant's Untreated Chart Sheet."

Q. 52. In order to secure an exact balancing of the rotary cylinder or drum as manufactured in the factory of the Toledo company, is anything further done than to wrap the chart sheet around stamped out spiders or frames and secure the chart sheet by the staples to said frame?

A. In order to balance the chart the chart spiders which form the framework for the paper, the arms of these chart spiders are slotted to receive little sliding weights, which are fastened to the chart spider and clamped into position by means of small screws and washers.

Q. 53. Is this the case also in complainant's scales of the

type represented by "Complainant's Exhibit Complainant's Scale"?

A. The method of balancing the chart in this scale is very similar.

Q. 54. Do you know of any difficulties or troubles that have resulted from light construction of cylinders or drums in these automatic cylinder scales, for example, such a cylinder or drum as that which forms a part of "Complainant's Exhibit Cylinder Scale"?

A. Yes, we used to have trouble with some of the scales of the hanging drum type that were built at the Saugatuck factory and shipped to Dayton. Upon opening some of these scales up to inspect them for reshipment we would occasionally find that the chart was binding or rubbing against the cylinder casing, possibly due to the fact that the scale in transit had got a severe jolt endwise and the aluminum chart spiders were not stiff enough to hold the paper in its same relation to the shaft.

Q. 55. Has this difficulty or trouble been experienced by the Toledo company?

A. No, sir, it has not.

Q. 56. Why not?

A. Because when the dies were made for producing this chart spider we made a rib section of the same, which made it much stiffer; what I mean by this is that the arms of the chart spider were made with stiffer sections.

Q. 57. Do you refer to the form and construction of spider arms that is found in "Complainant's Exhibit Defendant's Scale"?

A. Yes, sir, I do.

Q. 58. Have you recently conducted any tests with the cylinders of Toledo scales considerably increased in weight, and if so, with what result?

A. Yes, sir, I have conducted two experiments with two different scales, of the Toledo type. In both scales considerable weight was added to the cylinder to determine whether the adding of this additional weight would affect the sensitiveness of the scale. In both cases I found that it did not.

Q. 59. Did any one witness or perform tests upon either of those two scales besides yourself; if so, whom?

A. Mr. Kempster B. Miller.

Q. 60. Where has this testing of such scales been done, that is, scales wit the cylinders appreciably weighted?

A. In the invention department of the Toledo Computing Scale Company, at Toledo.

Q. 61. Has it been done since then with these same scales?
A. Yes, sir, on this gold scale it has been done since here at this office.
Q. 62. After first conducting tests with the cylinder weighted in either one of the scales referred to by you was there further or increased weighting of the cylinder and testing of the scale?
A. Yes, sir.
Q. 63. Are both the scales that you refer to here present?
A. Yes, sir.
Q. 64. Which is the one that was first tested?
A. The copper-colored model.
Q. 65. And is this the one in which the cylinder was weighted to a greater extent after the first tests had been made?
A. Yes, sir.
Q. 66. In the tests made with the other or gold-finished scale was the weighting of the cylinder done by the application of the same amount of weight as in the first testing of the copper-plated scale or as in the second testing with heavier weights, or with both?
A. With the heavier weights, so that the weights on both scales now are equal.
Q. 67. How do these two scales differ in construction?
A. The only difference in their construction is that in the copper model scale the cylinder or computing drum is mounted in ball-bearings instead of roller or disk bearings, which the gold scale has.
Q. 68. How does the gold scale compare in construction with "Complainant's Exhibit Defendant's Scale"?
A. There is absolutely no difference in the mechanical construction so far as the working the scale is concerned.
Q. 69. The gold scale, then, has just the same sort of bearings for the cylinder that "Complainant's Exhibit Defendant's Scale" has, has it?
A. Yes, sir.
Q. 70. To about what extent has the weight to the cylinder or drum been increased in the gold scale?
A. To about three times the original weight of the chart.
Q. 71. In what manner has this increased weight been applied to the chart?
A. By fastening eight brass counter weights, one on each arm of the chart spiders at either end of the cylinder.
Q. 72. Is the gold scale so equipped at the present time?
A. Yes, sir.

Q. 73. Have you at hand standard weights by which to test the accuracy of this gold scale?

A. Yes, sir.

Q. 74. Will you please test it for accuracy, using such weights as you have at hand, and then state the character of your test and the results?

A. I have tested this scale through one pound at a time from zero to twenty pounds and find that the scale weighs correctly at the different pound markings, and also find that the scale is sensitive to a quarter and also to an eighth of an ounce with the full twenty pounds weight added to the platform of the scale.

Q. 75. Will you please now conduct a similar test, but in the reverse order, that is to say, beginning with the scale loaded to its capacity, and reducing the load a pound at a time, and in answering please state how this sort of a test compares in severity with the first test that you made?

A. I then put twenty pounds on the scale, which is the full capacity, and took one pound off at a time until zero was reached, and found at no time that the scale showed a variance from the pound line between the backward and the forward weighing. This last test of weighing backward on a scale is one of the most severe tests that can be given a scale, because when a scale is made to weigh correctly by putting the weights on from zero to twenty pounds and then start at twenty pounds and take off the weights, whatever friction is in the scale would have divided itself to the other side, or the fast side, of the pound line, which would naturally show a discrepancy between the backward and the forward weighing. This is considered one of the best ways of ascertaining how much friction there is in a weighing machine.

Q. 76. Please now test by placing the same weight repeatedly upon the scale, using a variety of weights, including the smallest weight that you have at hand, and then state whether in these experiments the indication shown varies for the same weight or load put upon the platform at different times.

A. I next took the following weights, one-eighth ounce, one-quarter ounce, one ounce, one-quarter pound, one-half pound, one pound, six pounds and twelve pounds. I took these different denominations of weights and placed one of each denomination on the scale several times, carefully noting whether the scale showed the same indications with the several different trials of the same weights, and found in all cases that it did.

Adjourned to January 18, 1912, at 10 o'clock A. M.

January 18, 1912, 10 o'clock A. M.

Met pursuant to adjournment.

Present:

Mr. Davis and Mr. Scott.

Direct Examination of Clarence H. Hapgood Continued by Mr. Davis.

Q. 77. Please now remove the eight weights from the cylinder of "Defendant's Exhibit Defendant's Demonstrating Scale No. 1," and then test it in just the same way that you tested it with the said weights on the cylinder, and in answer to this question state how the testing without the weights compares with the testing with the weights.

A. I then removed the eight large counterweights from the arms of the computing cylinder on the gold scale. I next tested the scale, starting at zero, placing on one pound at a time until twenty pounds, the capacity of the scale, had been reached. I then placed one-quarter ounce and one-eighth ounce on the scale at the full capacity, and found the scale to respond with either of the small weights. I also found that the scale weighed correctly at the pound graduation all through this test from one to twenty pounds. Starting at the full capacity of the scale I next took off weights one pound at a time and weighing backwards to a zero position of the chart. After completing this test I found that the scale did not indicate off from the pound line either in weighing backward or forward. I next took weights of the following denominations, one-eighth ounce, one-quarter ounce, one ounce, one-quarter pounds, one-half pound, one pound, six pounds and twelve pounds, and made repeated tests with each of the above mentioned weights, and found that with the same weight in the several tests the scale always showed the same indication.

Q. 78. Did you observe any difference between the indications when conducting the tests described in your last answer from what those indications were under corresponding loads when you similarly tested the scale with the weights upon the cylinder in the course of your deposition yesterday?

A. I did not.

Q. 79. Will you please now direct your attention to "Defendant's Exhibit Defendant's Demonstrating Scale No. 2,"

and state in what condition you find this scale with respect to its cylinder or drum?

A. I find it with the large counterweights removed.

Q. 80. Please now go through the same tests upon this scale that you performed upon "Defendant's Exhibit Defendant's Demonstrating Scale No. 1," and then state how the scale indicated under the series of tests in comparison with the indications that were shown by "Defendant's Exhibit Defendant's Demonstrating Scale No. 1" under corresponding tests.

A. I next tested this scale, "Defendant's Exhibit Defendant's Demonstrating Scale No. 2," starting with the scale at zero, placing weights on the scale one pound at a time at each and every pound up to the full capacity of the scale, twenty pounds. I then tried one-quarter ounce and one-eighth ounce weights when the scale was loaded to its capacity, and found the scale responded to these weights. Starting with the scale at full capacity, I then took off weights one pound at a time at each respective pound, weighing backwards on the scale until the chart had returned to zero. In making these tests by weighing forward and back, I found the scale to weigh accurately upon the pound indications, and not vary from the line in either the forward or backward weighing. I next took weights of the following denominations, one-eighth ounce, one-quarter ounce, one ounce, one-quarter pound, one-half pound, one pound, six pounds, and twelve pounds, placing these respective weights each of them on the scale several successive times, and found that the scale showed the same indication when the same denomination of weight was applied. I could see no material difference between the indications on Demonstrating Scale No. 2 and Demonstrating Scale No. 1.

Q. 81. Please now apply to the cylinder of Demonstrating Scale No. 2 the set of eight weights such as those which were upon the cylinder of Demonstrating Scale No. 1 when you made the test with the latter yesterday in giving your deposition, and then again test Demonstrating Scale No. 2 in the same manner that you tested it before giving your last answer. Having done so, please state what the tests consisted in, and how the indications of weight under the different loads, compared with the indications under corresponding loads when you tested this same Demonstrating Scale No. 2 without the weights being upon its cylinder.

A. I have added the eight large counterweights to the arms of the chart spiders of the computing cylinder in "Defendant's Exhibit Demonstrating Scale No. 2," and after

properly balancing the cylinder with these large counterweights so that the scale would again weigh correctly, I made the test as follows: Starting the scale at zero, I placed weights on the platform of the scale one pound at a time at each and every pound graduation, from zero to twenty pounds, the full capacity of the scale. I next placed the one-eighth ounce weight and then a one-quarter ounce weight on the platform when the scale was loaded to its full capacity, and found that the scale responded to each of these small weights. Then, starting at twenty pounds, the full capacity of the scale, I took weights off from the platform one pound at a time at each respective pound, weighing backward on the scale until the zero position of the scale had been reached. I found that in making this test forward and backward that the scale did not vary off from the indicating lines which designate the pound graduations. I next placed the following denominations of weight, one-eighth ounce, one-quarter ounce, one ounce, one-quarter pound, one-half pound, one pound, six pounds and twelve pounds on the platform of the scale; each of these respective weights being placed on the scale several times in succession, and found that when the same weight was placed on the platter that it resulted in the same identical indication. I find no difference in the accuracy of this scale in testing it with the eight large counterweights than without, as in the former test.

Q. 82. Are the weights at hand which were originally used in the tests that were made with Demonstrating Scale No. 2; I mean the weights that you referred to at a previous point in your deposition as not being quite so heavy as those now upon the scale?

A. Yes, sir, the weights are here; these are the eight weights which were originally on "Defendant's Exhibit Demonstrating Scale No. 2" when Mr. Miller originally saw this test. Since then these weights have been reinforced to make them still heavier, as I found when the man whom I ordered to conduct the experiment had made an error and not brought the original weights up to what they should have been.

Q. 83. Will you please weigh these eight weights and state what their aggregate weight is?

A. Seventeen and three-eighths ounces.

Q. 84. Do you remember about how much aggregate weight was added to them to bring the total weight of the loaded cylinder up to what you intended?

A. About half an ounce on each weight, as I found his eight weights were deficient four ounces.

Q. 85. In adding weight to the cylinder of the Toledo scale by what were you governed in the extent of increase of weight, that is, did this have reference to the weight of any particular thing, and if so, what?

A. I brought it up to the total weight of the cylinder in Defendant's Exhibit Dayton Cylinder Scale, that is, the total weight of this cylinder without the hand operating knob.

Q. 86. How do the eight weights that you have now mounted upon the cylinder of Demonstrating Scale No. 2 compare in aggregate weight with the aggregate weight of the eight weights that you just weighed before answering question 83?

A. I have weighed them, and they weigh identical with the other eight weights, 17⅜ ounces.

Q. 87. Had the eight weights that were upon the cylinder of Demonstrating Scale No. 1 when you tested it in giving this deposition, previously been upon the cylinder of Demonstrating Scale No. 2, and was Demonstrating Scale No. 2 tested by you with those weights upon its cylinder?

A. The weights with which the test was conducted on Exhibit Demonstrating Scale No. 1 are the same weights which were originally on Exhibit Demonstrating Scale No. 2.

Q. 88. Do you mean that they were upon Demonstrating Scale No. 2 after their aggregate weight had been increased by the reinforcing you mentioned in a previous answer?

A. Yes, sir.

Q. 89. Will you please state whether or not Demonstrating Scale No. 1 is a stock Toledo scale?

A. Yes, sir; it is. I had it sent down from the Chicago office on telephone call.

Q. 90. How about Demonstrating Scale No. 2, what does that represent, as a Toledo product?

A. It represents the model which was made to demonstrate the location of the dash-pot changed from a position directly under the edge of the platter to a point farther back nearer the fulcrum of the lever.

Q. 91. Do you mean that it was a model or specimen scale that you had on hand at the time you were called upon to conduct tests with a weighted cylinder or drum?

A. Yes, sir; I simply took an experimental model rather than take a new scale, because the scale was not in a condition to abandon as a model and work into regular stock on account of the lever and base of scale being changed.

Q. 92. Had the matter of ball bearings been pursued in

the Toledo factory prior to the time when you were called upon to make this test with the weighted cylinder?

A. Yes, sir. We had put out scales with ball bearings for nearly a year.

Q. 93. Does the employment of ball bearings permit of any advantageous modification with respect to operating connections for revolving the drum?

A. In my opinion, yes.

Q. 94. Can you point to anything in this regard from a comparison of Complainant's Exhibit Cylinder Scale with Complainant's Exhibit Complainant's Scale?

A. In the hanging scale construction the journal ends of the shaft on which the computing drum is mounted revolve in holes in bronze castings which would produce considerable friction, while the bearings employed in Complainant's Exhibit Complainant's Scale are ball bearings. Another difference I see in construction of the charts in the two exhibits is that in the hanging scale they use pinions of about 3/4 inch pitch diameter, while the pinions on the computing cylinder of the platform cylinder scale exhibit are of 9/16 inch pitch diameter. The use of a larger pinion in the hanging cylinder scale, being Complainant's Exhibit Cylinder Scale, was employed to offset, as far as possible, the friction which would be caused by the cylinder shaft being journaled in the plain bearings. The use of a smaller pinion was desirable when the scale was made into a platform cylinder scale because it decreased the movement of the lever, the lever not having to make such a long stroke to revolve the chart a complete revolution.

Q. 95. What should you say would be the natural thing for a mechanic to do if he was handed this cylinder of Defendant's Exhibit Dayton Cylinder Scale and told to make one like it, increasing the diameter from 5 to 8¼ inches?

A. If the mechanic was a good designer he would be able to increase the size of the chart without greatly increasing its weight for the reason that the cast iron ends are entirely out of design for any work they might be called upon to do.

Q. 96. Do you think such mechanic would feel called upon to increase the dimensions of the component parts of the drum or cylinder in the matter of their thickness?

A. No, not necessarily.

Q. 97. How would such mechanic proceed in order to produce the larger drum without greatly increasing its relative weight?

A. One of the first things he would do, in my opinion,

would be to completely lighten up the webs or spokes in the ends and reduce them from a 5/32 thickness to about 3/32; and the rim which now measures half an inch across could be easily reduced to one-quarter of an inch or even less, while the amount of metal around the point which encircles the shaft could be greatly reduced.

Q. 98. Do you think this would be the natural thing for an ordinary molder to do in the common practice of his trade if called upon to supply end pieces for a drum like that of Complainant's Exhibit Dayton Cylinder Scale, but of the increased diameter mentioned?

A. If the designer had distributed his metal properly in making the design for the pattern, I see no reason why any intelligent molder should not produce same with the right equipment and the right kind of iron, the right quality of iron.

Q. 99. Should you say that an ordinary pattern designer would naturally proceed in the practice of his trade in such manner as you have suggested in answer to Q. 97, having reference to the designing of end pieces for a drum like that of Defendant's Exhibit Dayton Cylinder Scale, but of larger diameter?

A. I think he would, for the reason that an up-to-date designer would first want to know the duty that the parts which he intended making would be called upon to perform, and he would make them of only sufficient strength to a little more than do what would be required of the piece to be designed.

Q. 100. In producing the larger drum like such drum as that in Defendant's Exhibit Dayton Cylinder Scale, would there be any occasion for increasing the size of the central shaft or spindle or increasing the thickness of the paper shell that is applied around the head?

A. I would think not.

Q. 101. In your cross-examination in your previous deposition in this case inquiry was made as to the reason for your leaving the employment of The Computing Scale Company of Dayton; I wish you would state whether or not that company has since approached you in any way or made any overtures to you having reference to your again entering its employ.

A. Yes, sir. About two years ago while at the Toledo factory I received a long-distance call from Mr. Hopkinson, of the Dayton Computing Scale Company, wanting me to

again enter their employ to come to Chicago to take care of their mechanical work in that locality.

Mr. Davis: The two demonstrating scales are now offered in evidence as Defendant's Exhibit Demonstrating Scales Nos. 1 and 2.

Cross-Examination by Mr. Scott.

XQ. 102. I understand from your direct testimony that the arms of the spiders forming part of Complainant's Exhibit Defendant's Scale are flanged at the edges in order to stiffen them, that is, to make them stronger. These arms could have been stiffened or strengthened, could they not, by simply making them thicker and heavier?

A. Yes, they could have been.

XQ. 103. What is the reason that they are made of thin metal flanged at the edges instead of being made of thick metal such, for instance, as the arms of the spiders forming the ends of the cylinder of Defendant's Exhibit Dayton Cylinder Scale?

A. For two reasons: First, from a matter of economy; second, from the standpoint of the upkeep of the tools which produce these pieces.

XQ. 104. Are there any other reasons?

A. A third reason might be added, from the fact there is no use in giving a man a boy's work to do.

XQ. 105. The construction of spiders involving thin metal flanged at the edges has nothing to do, has it, according to your belief, with the operativeness or durability of the scales in which these parts are used. Is that correct?

A. I would say they might have, to some extent.

XQ. 106. In what respect and to what extent?

A. The less duty a piece of machinery is called upon to perform the longer will be its life of utility.

XQ. 107. What would you say as to the operativeness and durability of a scale like Complainant's Exhibit Defendant's Scale, having a revolving cylinder that weighed 7 pounds, the construction of the scale being otherwise unaltered?

A. The weight of that cylinder in a scale is so outrageously heavy that I could form no conclusion as to what it would do or how long it would last.

XQ. 108. Would you say the same of a cylinder weighing 5 pounds?

A. Any opinion I might give on the question would only be a conjecture.

XQ. 109. Will you give the best information that you can from your experience as a scale expert?

A. I would say that a cylinder might be weighted up to even 5 pounds and if this cylinder were mounted in the proper kind of bearings, such bearings being of such a character that the dead weight of the cylinder would not be too great to destroy the sensitiveness of the bearings, I think if the scale were used and not abused it would stand up for a considerable length of time.

XQ. 110. What parts of such a scale are subjected to increased strain and wear by added weight in the revolving cylinder?

A. I would say the bearings on which the cylinder shaft is mounted.

XQ. 111. Anything else?

A. The rack and pinion might be subjected to an additional wear, but this could be overcome to a great extent by simply adjusting the dash-pot which governs the vibration of the chart so that the shock from taking weights off or placing them on the platter quickly would not be transmitted into the rack and pinion.

XQ. 112. Is there any limitation upon the degree of resistance that can be imposed upon such a scale through the dash-pot?

A. That depends entirely on the construction of the dash-pot.

XQ. 113. Taking the kind of a dash-pot that forms part of Complainant's Exhibit Defendant's Scale, and increasing the resistance of the dash-pot up to a degree sufficient to take care of the shocks caused by a 5-pound revolving cylinder, what effect, if any, would be caused upon the operation of the scale?

A. I don't think you would notice any difference in the result until the dash-pot were closed down to a point beyond where it would have to be to control a scale with an additionally weighted chart.

XQ. 114. Did you ever have any personal knowledge of scales like Complainant's Exhibit Defendant's Scale and provided with revolving cylinders having cast iron ends, being manufactured, sold and used in the ordinary course of business?

A. No, sir; I have not.

XQ. 115. Did you ever know of any scales of the type represented by Complainant's Exhibit Defendant's Scale or Complainant's Exhibit Complainant's Scale, being manufactured, sold and used in the ordinary course of trade, except such as were provided with paper covers for the cylinder of substantially the thickness used in scales referred to and having thin sheet metal spiders to support the paper shell of the cylinders?

A. No, sir; I have not.

XQ. 116. Do you know whether hanging scales similar to Complainant's Exhibit Cylinder Scale were manufactured and sold by The Computing Scale Company of Dayton, either there or at Saugatuck, Connecticut, from the time you first saw such scales, which I believe you said was about the latter part of 1899, until May, 1902, when you returned from England?

A. I think they were manufactured.

XQ. 117. Do you remember whether those scales had reversely arranged columns of weight indications and openings in the front and the back of the casing, one opening exhibiting one column and the other opening exhibiting the other column?

A. Yes, sir; I think they had.

XQ. 118. Is it your understanding that those scales similar to Complainant's Exhibit Cylinder Scale sold between 1899 and May, 1902, were sold generally for use in the ordinary course of business by the purchasers?

A. I would think they would be.

XQ. 119. Referring to Defendant's Exhibit Demonstrating Scale No. 1, will you state how much the revolving cylinder weighs in its normal condition?

A. I never have weighed the cylinder in Defendant's Exhibit Demonstrating Scale No. 1, but I have weighed the cylinder in Defendant's Exhibit Demonstrating Scale No. 2; this cylinder weighs $8\frac{5}{8}$ ounces. I have every reason to believe that the one in Exhibit Demonstrating Scale No. 1 is of almost the identical weight because the construction and material are very similar.

XQ. 120. With the added weights, then, I take it that the cylinders of these scales weigh about 26 ounces?

A. Yes, they weigh 26 ounces.

XQ. 121. I notice that in your demonstration of Demonstrating Scales Nos. 1 and 2 you have mounted the weights upon the spokes of the spiders about half way between the

center and the periphery of the cylinders. What effect would it have if these weights were moved out to the periphery as far as they will go?

A. It would mean that when a weight were placed on the platter the scale or computing cylinder would make, possibly one or two additional oscillations.

Recess.

XQ. 122. The farther the weight is from the center of the cylinder the greater its momentum or inertia is when the cylinder is revolved, is it not?

A. I believe that is true; yes, sir.

XQ. 123. Then, if you were to make the shell of the cylinder in Complainant's Exhibit Defendant's Scale, or the scales with which you have demonstrated, of a thickness equal to that of the shell in the cylinder of Defendant's Exhibit Dayton Cylinder Scale an amount of momentum or inertia would be added to the cylinder greater than would result from increasing the weight by the same amount at a point near the center of the cylinder; is that correct?

A. The momentum would be increased; yes, sir.

XQ. 124. That is, it would be increased more than if the same weight had been added near the shaft?

A. I believe that is so, too.

XQ. 125. About what is the radius of the pinion which is mounted upon the shaft of the cylinder in Complainant's Exhibit Defendant's Scale; I mean the pitch diameter which I understand is the diameter at about midway between the base and points of the teeth, where the teeth normally contact?

A. About 23/32 of an inch pitch diameter.

XQ. 126. That would make the radius 23/64 of an inch, would it not?

A. Yes, sir.

XQ. 127. Will you please state the radius of the computing cylinder in Complainant's Exhibit Defendant's Scale?

A. About 4 5/16 inches is the radius.

XQ. 128. This makes the radius of the computing cylinder about twelve times the radius of the pinion, does it not?

A. Approximately so, yes.

XQ. 129. Therefore a force acting at the periphery of the cylinder, that is, a tangential force due to centrifugal action, would act with a leverage advantage of 12 upon the pinion, that is, would cause a pressure upon the pinion 12 times the extent of the force at the periphery; is that correct?

A. I think that is a fair statement, as it is simply a matter of leverage, to the best of my knowledge.

XQ. 130. Have you ever observed the velocity at which the periphery of the cylinder moves when a heavy weight is suddenly placed upon the platter of the scale or suddenly removed therefrom?

A. Yes, I have.

XQ. 131. Have you ever observed it in such a way that you could state that velocity in figures?

A. I can only say that velocity is entirely governed by the adjusting of the dash-pot to overcome the oscillations of the cylinder.

XQ. 132. Will you kindly take a heavy object, some book, for instance, weighing 16 to 18 pounds, and place it upon the platter of Demonstration Scale No. 2, depositing the same suddenly, or as would ordinarily be done by a merchant using the scale, and observe the speed at which the cylinder is caused to rotate?

A. A load was placed on the scale of 17 pounds 10 ounces; taken off the scale quickly; thrown on again in the manner in which a butcher would possibly use the scale; this operation was repeated ten times; at the same time I observed the speed with which the cylinder rotated.

XQ. 133. The speed is much higher with a heavy weight than with a slight weight, is it not?

A. Dependent entirely upon the adjustment of the dash-pot, but naturally a heavy weight thrown quickly on the platter will cause the chart to revolve at a greater speed than a lighter weight with the same given adjustment of the dash-pot.

XQ. 134. Will you kindly move the weights which you have placed upon Defendant's Exhibit Demonstration Scale No. 2 out as far toward the periphery of the cylinder as they will go, keeping the cylinder in balance of course, and then test the scale in the ordinary manner?

A. I have moved the counterbalance weights in this scale to a point out as near the edge of the chart as permissible with the construction, then rebalanced the cylinder so that the scale would weigh correct, put on test weights starting at zero at intervals of every pound from zero to 20 pounds inclusive. I then tried weights of $\frac{1}{8}$ ounce and $\frac{1}{4}$ ounce at the full capacity of the scale, 20 pounds, and found the scale responded to each of these small weights. Starting at 20 pounds, the full capacity of the scale, I removed weights

from the platform 1 pound at a time at each and every pound from 20 pounds, weighing backward to a zero position of the chart. I found there was a slight variance at some of the pound indications between the forward and the backward weighing, but in no case did the indicating line show entirely off from the graduation which indicated the pound markings.

XQ. 135. Will you now weigh upon the Demonstration Scale No. 2 some object weighing upwards of 15 pounds, placing the same on the scale and removing it therefrom several times, and note the results?

A. As it is almost impossible for one person to read the scale accurately and put a heavy weight on a successive number of times, I seated myself so that my eyes would be in a fixed position in relation to the reading line of the scale while a book weighing 17 pounds and 10 ounces was thrown on the scale and taken off quickly ten different times, and I saw no variation in the registration in any of these ten weighings.

XQ. 136. What would you say was the relation between the amount of strain placed upon the rack and pinion at the point where they intermesh in the cases of the cylinder of Demonstrating Scale No. 2 with the cylinder in its normal condition and its condition as weighted in your demonstrations?

A. I would say it was very slight due to the fact that the cylinder in either case is almost perfectly balanced and requires only a grain or two of weight to move same.

XQ. 137. Is not the strain upon the rack and pinion caused by the centrifugal force of its weight when revolving?

A. Yes, when the dash-pot is not properly adjusted as it would be by an operator to get a quick result.

XQ. 138. The dash-pot, as I understand it, operates according to the manner in which it is set to absorb the force due to the weight of the object placed upon the platform, but with whatever speed the cylinder rotates the strain upon the rack and pinion is proportional to the speed of rotation and weight of the cylinder; is that correct?

A. I believe that to be correct.

XQ. 139. Did you ever have any personal knowledge of a computing scale of the type of Defendant's Exhibits Demonstrating Scales Nos. 1 and 2 with cylinders as heavy as you have weighted them in your demonstrations being put into actual use in the course of trade, and if so, with what result?

A. I never have known these scales to be manufactured

or put into use with the cylinders as heavy as the ones in the two scales mentioned.

XQ. 140. In your experience as a constructor and designer of scales how extensive a test of a new departure is desirable or necessary before putting a scale upon the market for actual use?

A. That would depend entirely upon the nature of such new departure.

XQ. 141. To your knowledge did the Toledo Computing Scale Company put any computing cylinder scales upon the market prior to the cylinder scale which you perfected some time about the beginning of 1906?

A. Not to my knowledge.

XQ. 142. I invite your attention to Complainant's Exhibit Defendant's Scale, and to the platform cylinder computing scales made by the Computing Scale Company of Dayton which you saw at the factory of the Toledo Computing Scale Company at the time you entered their employ in July, 1905, and ask whether both of these scales did not have a computing cylinder with a paper cover or shell?

A. Yes, sir.

XQ. 143. In both scales the paper shell of the cylinder bore several columns of value or price indications and also reversely arranged columns of weight indications, did they not?

A. I believe they did.

XQ. 144. And in both scales the stationary casing which surrounded the revolving cylinder had openings in opposite sides, each opening permitting the reading of one only of the columns of weight indications, did it not?

A. Yes, sir. One or two of the first models of the Toledo cylinder scale did not have the opening in the back to show the weight indication to the customer.

XQ. 145. But all of the later scales, including all that were put upon the market, did have such openings in opposite sides of the casing to permit the reading of one only of the columns of weight figures, did they not?

A. To the best of my knowledge.

XQ. 146. And in both of the scales referred to the paper shell of the cylinder was supported upon light metal spiders, was it not?

A. Yes, sir.

XQ. 147. And in both of the scales referred to the shaft of the cylinder was provided with roller or ball bearings, was it not?

A. Yes, sir. That is, in scales of the platform cylinder type, although I have seen some of the sixty-threes which were put out by the Dayton Company and later traded in by the Toledo Company which did not have ball bearings, but had the same style of bearing as shown in-that exhibit hanging scale over there. (Complainant's Exhibit Cylinder Scale.)

XQ. 148 . And in both of the types of scales referred to in XQ. 142 the shaft of the cylinder had fixed thereto a pinion, did it not?

A. A pinion or pinions; yes, sir.

XQ. 149. And in both of these types of scales the pinion was engaged by a rack, was it not?

A. Yes, sir; either one rack or two racks.

XQ. 150. And in each of these types of scale the rack was attached in some manner to the lever upon which the platter or platform was carried, was it not?

A. Yes, sir; the rack was attached either directly or indirectly.

XQ. 151. In the Toledo Computing Scale Company's platform cylinder scale as first put out was the rack mounted upon a pivotal bearing with a weight upon one side of the bearing to cause the rack to keep in mesh with the cylinder pinion?

A. I believe it was.

XQ. 152. And was this also true of the platform cylinder computing scales made by the Computing Scale Company of Dayton which you saw at the factory of the Toledo Computing Scale Company when you entered its employ in 1905?

A. I believe the racks were held in mesh with the pinions in the scales manufactured by the Dayton Computing Scale Company by a counterweight on the rack bar.

XQ. 153. And in both of the types of scale mentioned in XQ. 142 the platter was mounted upon the lever between the fulcrum of the lever and its point of connection with the rack bar, was it not?

Mr. Davis: Objected to as immaterial and irrelevant to any issue in this cause.

A. Yes, sir.

XQ. 154. And in both types of scale mentioned was there a counterweight upon the main lever upon the side of the fulcrum opposite to that side upon which the platform was mounted?

Mr. Davis: Same objection, and also as incompetent be-

cause there is no basis for such line of cross-examination in the direct testimony of the witness.

A. I believe the levers in both scales had counterweights on the reverse side of the fulcrum upon which the platter was pivoted.

XQ. 155. And in both types of scale mentioned the computing cylinder was mounted above the platter or platform and to the rear thereof, that is, the side thereof farthest from the fulcrum of the lever on which the platform rested, was it not?

Mr. Davis: Same objections.

A. I believe the cylinder was mounted in this manner.

XQ. 156. And both of the types of scale mentioned were provided with means for restraining the oscillations of the computing cylinder, were they not?

A. Yes, sir.

XQ. 157. And what did these means for checking the oscillations consist of?

A. Some of the earlier platform cylinder scales which I saw at the Toledo factory and were built by the Dayton Computing Scale Company had air dash-pots for stopping the vibration of the cylinders, while some of them which were made later had a liquid dash-pot.

XQ. 158. Is the pinion upon the platform cylinder scales now made by the Toledo Computing Scale Company of the same diameter as that upon the cylinder of Complainant's Exhibit Defendant's Scale?

A. Yes, sir, about the same; 23/32 inches pitch diameter.

XQ. 159. Have either of the scales which have been referred to as Demonstrating Scales Nos. 1 and 2, been in actual use in the course of trade?

A. No, sir; they have not.

XQ. 160. What is their condition as to wear; are they practically new scales?

A. Exhibit Scale No. 1 is a stock scale which has never been in use and was taken out of our Chicago sales office, while Exhibit Scale No. 2 is an experimental model built for experimental purposes only.

XQ. 161. Is Demonstrating Scale No. 2, so far as its working parts are concerned, practically the same as a new scale, with the exception of the location of the dash-pot which you have referred to before, and the added weights which have been placed thereon?

A. The only difference, in addition to the added weights

on the computing cylinder and the location of the dash-pot in the base, is the bearings upon which the cylinder shaft revolves, which bearings are very similar in type to ones with which we equipped cylinder scales for a period of about one year.

XQ. 162. The construction of the cylinders in the Toledo Computing Scale Company's cylinder scales is as light a structure as could be made to serve the purpose, is it not?

A. I would think so, yes, within a certain limit.

XQ. 163. In answer to Q. 95 you stated that the cast iron ends of Defendant's Exhibit Dayton Cylinder Scale are entirely out of design for any work they might be called upon to do. I take it that you mean by this that the constructor of the cylinder of Defendant's Exhibit Dayton Cylinder Scale apparently made no effort to design a light structure and made the cast iron ends without regard to lightness; is this a correct understanding?

A. I believe so, yes.

XQ. 164. In answer to Q. 95 you also said that a good designer would be able to increase the size of the chart of Defendant's Exhibit Dayton Cylinder Scale without greatly increasing its weight, and in a later answer stated that the webs or spokes might be reduced to 3/32 of an inch in thickness and the rim to a quarter inch or less, and that the amount of metal around the shaft could also be reduced; you intended to convey the idea, I presume, that all of these things could be done in case it were desired to produce a light construction; is that correct?

A. Not only could be done, but would be done by any firm looking toward the profits of its business by not adding additional weight or expense where it is unnecessary.

XQ. 165. Has this policy of using the least possible amount of metal that would answer the purpose been followed out in constructing the shaft, pinion and rack of the platform cylinder scales of the Toledo Computing Scale Company?

A. Yes, sir, it has, to get the best results from a manufacturing standpoint.

XQ. 166. Is there any limitation upon the size of the pinion upon the cylinder shaft of cylinder computing scales other than the desirability of economizing in material?

A. Why, yes, there are several reasons, one of which might be stated that the larger the diameter of the pinion the more accurately the teeth would be spaced in the cut-

ting; and second, a larger pinion gives a greater wearing surface on the teeth of this pinion per one revolution of the chart; and third, the pinion's diameter, in relation to the total diameter of the computing drum, is to a great extent a matter of leverage.

XQ. 167. The smaller the pinion the greater leverage the weight of the drum acts upon it with; is that not so?

A. I believe that to be a fact.

XQ. 168. What do you understand to be the extreme limit of size which the pinion may be given?

A. Why, you are limited to a certain extent in size by the movement of the lever which governs the motion of the pinion.

XQ. 169. It is desirable that the construction be such that the cylinder have a complete revolution, is it not?

A. Yes, sir.

XQ. 170. And in order for the cylinder to have a complete revolution the circumference of the pinion cannot be greater than the extent of the upward and downward movement communicated to the rack by the lever; is that not so?

A. This is so in the construction of the scales in question.

XQ. 171. In Complainant's Exhibit Defendant's Scale and the demonstrating scales which you have used, the size of the pinion could not be increased and still cause a complete revolution of the cylinder through its engagement with the rack unless a correspondingly greater movement was given to the rack by means of a change in the lever movement; is that not so?

A. The pinion could not be increased materially in size without changing the construction of the scale.

XQ. 172. The diameter of the pinion being so limited there is a corresponding limitation upon the size and thickness of the teeth of the pinion and rack, is there not?

A. Within certain limits, yes.

XQ. 173. And the shock caused by the oscillations of the lever is transmitted through the teeth of the rack and pinion, is it not, such shock being governed as you have previously indicated, by the dash-pot to as great an extent as permissible?

A. This is the case unless there were a shock absorbing device interposed between the lever and the point where the rack connected on the same.

XQ. 174. Are shock absorbers used at that point in cylinder scales of the kind we are discussing?

A. Yes, sir.

XQ. 175. These shock absorbers as I understand it, then, are for the purpose of relieving the rack and pinion teeth from strain as far as possible?

A. From an undue strain, yes, sir.

XQ. 176. If the rotating cylinder of these scales could be made of, say one-hundredth their present weight the strain upon the teeth of the rack and pinion would be correspondingly reduced, would it not?

A. My answer in this case would only be imaginary. The question is so beyond my imagination that there would be no chart, neither would there be any strain.

XQ. 177. That is, you mean that if this imaginary structure had no weight there would be no strain whatever upon the teeth of the rack and pinion?

A. I mean that if this imaginary structure had no weight there would be no chart, and therefore, no strain on the rack and pinion.

XQ. 178. The strain upon the teeth of the rack and pinion, then, arises solely from the weight of the cylindrical chart, does it not?

A. Yes, sir.

Redirect Examination by Mr. Davis.

RDQ. 179. Does the size of the cylinder pinion have anything to do with the range of movement of the scale beam or platform lever, that is to say, is the size of the pinion regulated thereby?

A. Yes, sir.

RDQ. 180. Is it desirable to keep down the range of movement of the scale beam or platform lever? That is, to limit its range of movement?

A. I would say that might make a difference in the construction of two scales of a different type or character.

RDQ. 181. Well, is it desirable in these platform cylinder scales to have as small a range of movement of the scale beam or lever as practicable?

A. While you might gain in one instance you might lose out in another; that is a matter of construction. What I mean by that is this, that a large pinion might be cut more accurate than a small one, while at the same time if that

scale had a smaller pinion it would enable the lever to have a lesser movement and enable you to get a greater angle on the knife-edge pivot of the lever and platform bearings which might materially increase the life of the scale, as upon these bearings nearly all the strain comes.

RDQ. 182. Which was the first to adopt or introduce the liquid form of dash-pot, the Toledo Computing Scale Company or The Computing Scale Company of Dayton?

A. I remember having seen scales built by the DeVilbiss Company before the Dayton Company started to put the liquid dash-pot on their platform cylinder scales.

RDQ. 183. Was this DeVilbiss Company the predecessor of the Toledo Computing Scale Company?

A. Yes, sir.

RDQ. 184. And was the platform cylinder type of scale the first one upon which the Dayton Company used the liquid dash-pot?

A. Yes, sir.

RDQ. 185. How did the indications shown upon the Exhibit Demonstrating Scales in the various tests that you have made throughout this deposition when the cylinders of those scales were weighted to about three times their normal weight, compare in point of accuracy with indications of scales like this Complainant's Exhibit Cylinder Scale that you have in the past been familiar with or have had occasion during your experience in the scale business to observe in operation?

A. Why, the tests which I made on both cylinder scales No. 1 and No. 2 Exhibits with their charts weighted showed a much greater degree of accuracy than any scale I ever saw of the hanging drum type manufactured by the Dayton Company.

RDQ. 186. You spoke of having seen some sixty-threes, by which I understand you to mean Dayton cylinder platform scales which had cylinder bearings like those in Complainant's Exhibit Cylinder Scale; do you recall whether in those sixty-threes there was inaccuracy in indication due to friction, such as you mentioned in the early part of your deposition as occurring in the scales of the type represented by Complainant's Exhibit Cylinder Scale?

A. The first platform cylinder scales which the Dayton Company made during the period of time that I was in their employ had a large diameter pinion about ¾ inch pitch diameter, and the shaft of the drum of these scales rotated in or-

dinary bronze bushings. These platform drum scales which were manufactured by the Dayton Company showed considerable friction and could very seldom be depended upon to show a positive indication.

RDQ. 187. Did they have a chart like that of Complainant's Exhibit Cylinder Scale as to the character of pound and ounce graduations?

A. Yes, sir.

RDQ. 188. And did they have the same kind of index pointers as in Complainant's Exhibit Cylinder Scale?

A. Yes, sir.

RDQ. 189. Will you please state the weight of the cylinder of Complainant's Exhibit Cylinder Scale?

A. Eight ounces.

RDQ. 190. Was a cylinder of this same weight or lightness employed in those sixty-three scales?

A. Yes, sir.

Recross Examination by Mr. Scott.

RXQ. 191. How thin can iron casting ordinarily be made?

A. About 3/32 of an inch.

RXQ. 192. When did you first see air checks or air dash-pots upon the hanging cylinder scales made by the Dayton Computing Scale Company, or made for them at Saugatuck, Connecticut?

A. As near as I can recal, some time in 1900.

RXQ. 193. With a hanging scale like Complainant's Exhibit Cylinder Scale it is practicable, is it not, to have a much greater range of movement of the platform than in the case of level scales such as Complainant's Exhibit Defendant's Scale?

A. No, I do not think so.

RXQ. 194. And what would be the limitation on the amount of movement on a hanging spring scale?

A. That would depend entirely upon the distension of the springs employed.

RXQ. 195. What kind of a scale was the one made by the DeVilbiss Company upon which you saw a liquid dash-pot? That is, was it a computing scale, and if so, what kind of computing arrangement did it have?

A. It was a computing scale with a computing device in the shape of a fan-shaped chart.

RXQ. 196. The moving element was a hand or finger that moved across the face of the chart, was it not?

A. Yes, sir.

RXQ. 197. You have said that in platform cylinder scales of the type of Complainant's Exhibit Defendant's Scale, if the pinion were enlarged it would necessitate a greater angular movement of the lever, while if a smaller pinion was used there would be less movement of the lever, thus rendering it possible to use knife edge pivots having a greater angle, thus lengthening the life of the scale as nearly all the strain comes upon these knife-edged pivots. Are these knife-edge pivots the first points at which scales ordinarily show deterioration when in use?

A. Yes, the pivots in the platform levers where the heaviest duty is performed.

RXQ. 198. And it is advantageous to construct these knife-edge pivots with a wide angle, if possible, in order to reduce the wear?

A. This is so in the platform lever which has the most work to perform.

RXQ. 199. What is the next point which ordinarily shows deterioration after these knife-edge pivots of the platform, speaking either of complainant's scale or of defendant's scale?

A. That depends entirely on how the scale was used or abused, as there is no particular point in any particular type of scale which would always wear out first.

Deposition closed.

CLARENCE H. HAPGOOD.

January 23, 1912, 2 o'clock P. M.

Met pursuant to adjournment. Present: Mr. Scott and Mr. Davis.

CHARLES G. MILBURN, called as a witness on behalf of defendant, having been first duly sworn, deposed and said as follows in answer to questions by Mr. Davis:

Q. 1. State your name, residence and occupation.

A. Charles G. Milburn; residence, 128 Edgar avenue, Dayton, Ohio; age, 26 in February, I am 25; occupation, scale mechanic.

Q. 2. Please state what relation you are to John H. Mill-

burn, of Detroit, Michigan, who has heretofore testified in this case.

A. Son of John H. Milburn, of Detroit, Michigan.

Q. 3. What business was your father engaged in when you were a young boy?

A. In the scale manufacturing business.

Q. 4. How far back does your recollection go as to your father's having been engaged in that business?

A. 1890, at Schuylerville, New York.

Q. 5. At what other place or places was your father engaged in the scale business?

A. Do you mean employed or having an interest in it?

Q. 6. Both.

A. Dayton Computing Scale Company of Dayton, Ohio; the Milburn Computing Scale Company, of St. Louis, Missouri; the Keystone Store Service Company, of Beaver Falls, Pennsylvania; The Stimpson Scale Company, Elkhart, Indiana; The Milburn Scale Company, of Detroit, Michigan. Also a firm in Philadelphia, the name I can't recall.

Q. 7. Do you remember when it was that your father was in the scale business at St. Louis?

A. As near as I can remember, from the spring of 1893 to the summer of 1894.

Q. 8. What sort of a place of business did he have at St. Louis, as far as you recall?

A. They were located on the second floor of a two-story building at the corner of Tenth and Walnut streets, St. Louis. The building still stands. They manufactured computing scales. It was known as the Milburn Computing Scale Company.

Q. 9. Were you in and about the shop with any frequency during that period of time?

A. Most every day.

Q. 10. Do you remember anything about the kind of computing scales that were made in that shop?

A. There were three kinds, one was a three bar, three to one leverage computing scale with oblong chart which computed to one pound. Another scale also used oblong chart and a sort of circular dial to the left of the oblong chart with rotating hand to indicate the price per pound. Another scale was of the platform type, using the oblong chart above a series of beams. The capacity of this scale was 120 pounds. Directly forward and to the right of the platform of this scale was a drum or cylinder for computing purposes, being entire-

ly independent of the working of the scale; this cylinder was rotated by means of a thumb screw or little knob, rather, to indicate values.

Q. 11. Do you remember how that rotating drum was made up in those scales to which you last referred?

A. As near as I can recall this drum, there was a chart on the inside of this drum, in the outer casing, rather, and was pasted over a pasteboard cylinder. There was spiders formed the framework for this pasteboard chart. I remember my father working this chart out long before this scale was manufactured.

Q. 12. Do you recall having seen such drums as this put together or having seen such parts as you have mentioned lying about at the shop during the period you referred to at St. Louis?

A. I remember very well seeing the different things lying about the shop and in the experimental room while this scale was in the course of manufacture. There were not very many of these made, I don't think.

Q. 13. How would the makeup of that cylinder or drum compare, as you remember it, with the cylinder or drum that forms part of Defendant's Exhibit Dayton Cylinder Scale?

A. There was very little difference, as far as I can see. In fact the castings at the end look identically the same.

Q. 14. Can you produce anything that illustrates the Milburn St. Louis scale that you have been describing as the same was constructed at St. Louis during the period mentioned?

A. I have got an envelope here with a cut of this scale on the outside of it; the reading on the envelope says "The Milburn Computing Scale Company, 24 South Tenth Street, St. Louis, Missouri." Immediately below the cut the writing says "Milburn, 120 Pound scale with general Computer." The directories of St. Louis, Missouri, show that the Milburn Scale Company was in existince at that time.

Q. 15. Where did you get this envelope that you just produced?

A. It was sent me by my father upon request for information to assist me in attempting to locate one of these scales.

Q. 16. Will you please indicate by a line and cross upon this envelope the drum or cylinder of this scale?

A. I have done so.

Q. 17. How do you account for your ability to remember

anything about the makeup of this particular scale as illustrated upon that envelope, considering your tender age at the period concerned?

A. I helped my father in the grocery business considerably in 1897, in Dayton, Ohio; he used one of these scales in the stores during the time that he was in business there. I have used this scale myself and remember it distinctly as being the identical scale that was manufactured in St. Louis. We used to make cart wheels out of the star-shaped castings at the end of the cylinder.

Q. 18. Then you continued, did you, to be familiar with this particular scale and the rotary drum thereof subsequent to the manufacture of those scales that went on in St. Louis in 1893 and 1894?

A. When I saw this even-balance Dayton scale with the drum that was turned by hand on it, it recalled to my memory this scale that my father used to make. I am positive I would know the scale immediately if I saw it at the present time. I did continue to be familiar with the manufacture of this type of scale afterwards.

Mr. Davis: The envelope produced by the witness is offered in evidence and the Examiner is requested to mark the same "Defendant's Exhibit Milburn Envelope."

Q. 19. Where did your father's family move to from St. Louis, and when?

A. We moved from St. Louis in the spring of 1894; that is, the family. He remained in St. Louis himself, for a period longer, the length of such period I am not positive of.

Q. 20. Do you remember anything about what went on at Beaver Falls, in the scale business that your father was connected with?

A. I remember that they made a platform scale and also a spring scale; the spring scale was cylinder in shape and was suspended or hung from a ring at the top of the cylinder. It looked very much like the scales used for weighing ice, an indicating hand traveled from top to bottom and an opening in the side of this cylinder showed the weight; a place down below for the pull, or whatever the case may be.

Q. 21. What opportunities did you have to become familiar with that scale at Beaver Falls, either then or afterwards?

A. Nearly every place that we resided my father always had a spare room set aside for use for experimental purposes; he work nearly every night in this room on various ideas, and being constantly around the house, I naturally no-

ticed nearly everything that he worked on. I remember him experimenting on a scale of this kind at home. I used to help him do little odd things, such as I could do at the time.

Q. 22. Do you remember at the time he did this experimenting last mentioned by you whether he had on hand one of these scales that you described as manufactured at Beaver Falls?

A. I can remember a scale that I saw in his room at 1314 Beaubien Street, Detroit, Michigan, in 1898. He always had at least half a dozen or so contraptions and half-completed scales and such lying around, in fact, some ideas that nobody ever saw but himself and members of the house.

Q. 23. Please look at Defendant's Exhibit Culmer Sketch, and state how the construction illustrated there compares with this Beaver Falls scale that you remember.

A. From the appearance of the sketch I see very little difference between the sketch and the scale which I saw in his room in Detroit.

Q. 24. Do you know what became of the Milburn scale that you have stated was used in your father's grocery store in Dayton, during the year 1897, that is, the scale of the kind illustrated upon "Defendant's Exhibit Milburn Envelope"?

A. I tried to find this scale about two weeks ago, and succeeded in tracing it from the time my father had it, in 1897, through the hands of a number of people; a man named Kaylor had it immediately after my father went out of business, and he sold his stuff out to a man named Mullen. Mr. Mullen in turn sold this scale with other store fixtures to people in Beavertown, Ohio; at Beavertown, Ohio, I lost track of this scale, and by accident located a man on National Avenue, Dayton, who, from the picture of the scale that I showed him, was positvie that he bought this scale at a sale for a dollar and a half. That was in 1906. He told me he threw it down in the cellar and left it there for a year and then brought it up and cleaned it up, and a salesman for the Dayton Computing Scale Company, who lived at Kingsville, Ohio, allowed him $25 on the old scale in trade for a new Dayton compting scale. He described the scale so accurately without any suggestions from me, that there is not a question of doubt in my mind but that he had the scale which I was looking for. He gave me one of the weights that he saved; on the back of this weight there was a peculiar mark in the lead used for sealing this weight, which was always used by my father, a small "X" to the left of an "M," which was made by a steel stamp.

As the Dayton plant was destroyed shortly after they took this old scale in, and also as nothing to speak of was saved in that fire, this old scale undoubtedly met the fate of many others, as it would seem probable that they would save more valuable things than this old scale if they had the opportunity to save anything.

Q. 25. Have you made any other efforts to get hold of one of the original Milburn scales like that illustrated upon "Defendant's Exhibit Milburn Envelope," and if so, what efforts?

A. Yes, my father told me that there were three of these scales sold in the city of St. Louis, either in the year 1893 or 1894; he nor I were positive of the exact date. Furnished with information from him such as names of different parties in St. Louis, I went there for the purpose of attempting to find one of these. I spoke to a number of people who said they had seen this scale in use in St. Louis, but could not remember who the parties were that had them, nor exactly when they saw them. I traced one of these scales from a gocery store in the south part of St. Louis to the point where it was sold at a sale, a negro being the buyer of the scale. It seems that this negro took it with him to Pine Bluff, Arkansas, and was in the grocery business there. A Mr. Englehart connected with the Anderson Agency in St. Louis, told me when I showed him this picture of this old scale, that he saw this scale on the grocery keeper's counter in Pine Bluff. He said he also had a Stimpson there, and that he sold him an Anderson and took the Stimpson in return, as he did not think the old Milburn scale was worth anything. I got in touch with a Mr. C. C. Buck, and learned through him that he could get no trace of this scale or this negro in Pine Bluff, as the period that Mr. Englehart referred to was three years ago. It is hard to say what has become of this old scale now. The other two scales I could find very little trace of. A number of second-hand dealers in St. Louis, though, told me they remembered distinctly such a scale. Also a number of the older grocers in South St. Louis spoke of having remembered such a scale, but could give me no information as to who owned it. I wrote to a Mr. John S. Dearing, in Colorado Springs, Colorado, who sold all of the Milburn scales, or nearly all, that were made in St. Louis. I expect to get some very good information from this gentleman in his reply. He left St. Louis in 1902 and moved to Colorado Springs and is now a salesman there. He owned property in St. Louis up until a few years ago.

Cross-Examination by Mr. Scott.

XQ. 26. About what was the total height of the scale your father made at St. Louis, which I understand is the one shown on Defendant's Exhibit Milburn Envelope?

A. I understand that the height compared favorably with the old Dayton beam computing scale. Most scales of the platform computing type are very similar as to height.

XQ. 27. In the scale made at St. Louis and shown on the envelope there was no connection whatever, was there, between the poise or other mechanism of the scale and the cylinder which bore the value indications?

A. No.

XQ. 28. There was not even a pointer on the poise, was there, that pointed to the proper part of the cylinder at which the reading was to be made?

A. No, the cylinder was used as an entirely independent computer.

XQ. 29. The cylinder would have answered exactly the same purpose, would it not, if it had been mounted on a separate base altogether and not in any way connected to the scale?

A. It would have answered the same purpose but was more convenient as used.

XQ. 30. No motion was automatically imparted to the cylinder when an object was weighed on the scale, was it?

A. No.

XQ. 31. Do you know whether your father in his experimental work which you have referred to made any attempt to produce a scale in which the computing cylinder would be automatically revolved by the weight of the object placed upon the platform of the scale?

A. Only in Beaver Falls do I remember of him working on any such a contrivance as you speak of.

XQ. 32. In the scale shown in Defendant's Exhibit Culmer Sketch the cylinder was rotated by hand, was it not?

A. I will not say positively.

XQ. 33. Can you explain the construction by referring to that sketch?

A. Do you mean the construction—

XQ. 34. Of that one shown in the sketch.

A. From the appearance of the sketch this was a round cylinder. This is a spring scale with a ring at the top for hanging or suspending. I can not see from the sketch how the cylinder was rotated, as the sketch merely shows the

downward or upward movement of indicating point such as would be caused by a weight hanging below and pulling on springs which is fastened inside to the top of the cylinder.

XQ. 35. Will you state what you remember about your father's efforts as referred to in your answer to XQ. 31?

A. As to the mechanical construction or details of this contrivance I can not remember positively, as I have only a faint recollection of this. In fact, he was working on something odd at all times and to describe all of his different experiments I could not do.

XQ. 36. Is it your recollection, however, that your father made some kind of an effort to produce a cylinder computing scale in which the cylinder would be automatically revolved by the weight of the object on the platform of the scale?

A. I remember slightly of something in regard to this, but can make no definite statement.

XQ. 37. Can you recall about what year it was that your father was at Beaver Falls?

A. He was in Beaver Falls two years altogether; in the latter part of 1894 he moved there and was employed by the Keystone Store Service Company in that city.

XQ. 38. You do not remember, do you, of your father having succeeded in producing a successful cylinder computing scale in which the computing cylinder was automatically revolved by the weight of the object on the platter or platform of the scale, do you?

A. I don't remember of any such a scale as having been actually perfected by him.

XQ. 39. You referred to three kinds of scales made by your father at St. Louis. Are you able at this time to describe them any more in detail than you did in answer to question 10?

A. My answer to Q. 10 describes the general outward appearance of these scales, except where I stated that one scale used oblong chart and a sort of circular dial to the left of the oblong chart with rotating hand to indicate the price per pound. I should have said that this hand indicated values and not price per pound, as the price per pound numbers were on this hand. In reference to cylinder being rotated on the larger scale by thumb screw, I should have said, knob or hand wheel.

XQ. 40. By what scale manufacturing concern have you been employed and during what period?

A. I was employed by the Milburn Scale Company, of Detroit, Michigan, for a period of about one year, from the fall of 1905 on; was employed by the Dayton Pitless Scale Company, of Dayton, Ohio, manufacturers of heavy draft scales, for two years from 1909 to 1911, and since last spring I have been in business for myself, in the scale business.

Mr. Davis: Q. 41. What are the pencil markings upon Defendant's Exhibit Milburn Envelope?

A. The notes on this old envelope were notes made in St. Louis of numbers of assessors' books in the City Building of St. Louis, to aid me in tracing John S. Deering, whose name also appears on the envelope. He was salesman for the Milburn Scale Company, of St. Louis. Other marks are addresses of old scale concerns in St. Louis whom I hoped to get information from.

Deposition closed.

UNITED STATES DISTRICT COURT,

Eastern Division.

Northern District of Illinois,

The Computing Scale Company, *vs.* Toledo Computing Scale Company. } In Equity. No. 30,024.

NOTICE.

To Messers, Sheridan, Wilkinson, Scott & Richmond, Marquette Bldg., City,

Gentlemen:

You are hereby notified that we shall resume the introduction of proofs on behalf of defendant in the above entitled cause, under the 67th Equity Rule as amended and in accordance with the stipulations hereinbefore entered into between the parties to the above cause by their counsel, before a competent Notary Public or other official, at the office of Fish, Richardson, Herrick & Neave, No. 5 Nassau St., New York, beginning at 11 o'clock in the forenoon, Thursday, January 25, 1912. Witnesses to be examined are F. J. Hull, Wm. Gardam

and Raphael Netter, all residents of New York, New York, and perhaps others. You are invited to attend.

RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

Chicago, January 23, 1912.

Service of the above notice acknowledged this 23rd day of January, 1912.

SHERIDAN, WILKINSON, SCOTT & RICHMOND,
Solicitors for Complainants.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company, *against* Toledo Computing Scale Company. } In Equity. No. 30,024.

New York, January 25, 1912.

Testimony on behalf of defendant, pursuant to the anexed notice, before C. E. Davidson, Notary Public, taken at the offices of Fish, Richardson, Herrick & Neave, No. 5 Nassau street, New York City, this 25th day of January, 1912, beginning at 12 o'clock.

Present:

Walter A. Scott, Esq., on behalf of complainant.

F. P. Davis, on behalf of defendant.

RAPHAEL NETTER, a witness called on behalf of defendant, being first duly sworn, testifies as follows:

Direct Examination by Mr. Davis.

Q. 1. Please state your full name, age, residence and occupation.

A. Raphael Netter; age, 51; residence, Manhattan, City of New York; occupation, mechanical draftsman.

Q. 2. How long have you been engaged in that occupation here in New York?

A. Since 1887.

Q. 3. I invite your attention to "Defendant's Exhibit Wise British Patent 678 of 1895," and will ask you to state whether you are familiar with what is illustrated by the drawings thereof, and if so, in what connection you first became familiar with what those drawings illustrate?

A. I recognize these drawings as having been made from a model representing a computing scale. I remember having made these drawings, or at least the originals, from this model.

Q. 4. Can you state whose model scale it was?

A. The work was handed to me by a Mr. Gaylord, who was employed by the firm of Duncan & Page, at the time, and he was in charge of preparing the application for a patent, and in the course of the time I was making the drawings I was introduced to a Mr. Wise, whom I was told to be an inventor.

Q. 5. In making the drawings did you follow the construction of the model scales that were brought to you?

A. I remember having followed the details of construction very closely.

Q. 6. Did you follow the model scale as to proportions of parts?

A. As near as practicable, and as is customary in patent drawings.

Q. 7. Do you remember whether the model scale was in an operative condition when brought to you?

A. I believe it was.

Q. 8. Do you remember whether you saw it operated at the time, or operated it yourself?

A. When the device was explained to me by Mr. Gaylord it was evidently operated for me in order to enable me to illustrate it to its best advantage, besides Mr. Wise was present or around the office while my work was in progress, which enabled me to ask him any questions which I deemed necessary.

Q. 9. Do you remember whether the scale was taken apart to any extent in connection with your work upon the drawings?

A. I remember that the drum was taken out of the machine.

Q. 10. What do you remember as to the construction of this drum which you speak of; that is how it was made?

A. I could not now enter into details concerning the drum,

excepting by referring to the drawings, from which I can tell why certain parts are indicated in certain ways.

Q. 11. Please look at Figures 3 and 4 of the drawings of said Wise British patent and state what is indicated as to the construction of the drum by the parts designated by reference letters G, I and H.

A. The letter G, I remembered, represented a paper drum carrying an arrangement of figures; the letter I represents a flanged disk, to which the part G is mounted, and the letter H represents a shaft which carries the part I, G.

Q. 12. In making the drawings illustrating the parts that you have just described, did you follow the construction of the drum as you found it when that drum was taken out of the scales, as previously mentioned by you?

A. I did.

Q. 13. About when was it that you made the originals of these drawings which form part of said British patent 678?

A. According to my account book of that time, which shows a charge for that work to Messrs. Duncan & Page, the work must have been made during the month of July, 1894, the same being billed to that firm on date of August 1, 1894.

Q. 14. In whose handwriting are the entries in this book that you have just referred to?

A. In my own handwriting.

Q. 15. What was your custom in making entries in this book as to the relation between the date of the entry and the time of doing the work to which the entry related?

A. I was in the habit, and requested by this firm, to render my bills the first of every month for work done during the preceding month. I also have the habit as soon as the job is completed to add my time and put the charge in my book when the work has been delivered.

Q. 16. Did you make other drawings illustrating any inventions of this man Wise than those of which the drawings in this British patent are reproductions?

A. No.

Q. 17. Was this the only occasion upon which you came in contact with this Mr. Wise?

A. It was.

Q. 18. Does this entry of a charge, as referred to by you, cover all of your work upon the originals of these British patent drawings?

A. It does.

Q. 19. In whose possession has this account book been since you started the entries in it, up to now?

A. In my own or in the hands of one of my employees, but it has never been out of my office.

Q. 20. Will you please read into the record here the date inscription and the name of the firm, and the entry that relates to the Wise matter?

A. "August 1st 1894

Duncan & Page

Wise—Scale indicator 20.00"

Q. 21. Will you please explain briefly how this book was kept by you during the time indicated by the various dates that appear in it.

A. The entries in this book were made for the work done for different parties during certain months. For instance, this book was started on July 1st, 1894, and contains entries to different parties up until May 1st, 1898.

Mr. Davis: The book produced by the witness is offered in evidence, and the Examiner is requested to mark the same "Defendant's Exhibit Netter Account Book."

Q. 22. Have you had in your possession anything else that related to this Wise scale, and if so, what?

A. I had some lithographs similar to the drawings before me, and also a tin type up to very recently, but seeing no further use for keeping them, I destroyed them.

Q. 23. What did the tin type show?

A. It represented a photograph of Fig. 2.

Q. 24. Do you mean a photograph of your drawing, or a photograph of part of the scale itself?

A. Of my original drawing.

Q. 25. Do you remember what sort of paper was used in the scale to form the part designated by the letters G in the drawings?

A. I remember that it was white paper.

Q. 26. Do you remember whether it was a single sheet of paper and what was the approximate thickness?

A. It was a single sheet and rather stout.

Q. 27. How should you say that it compared with the ordinary bristol board, such as is employed for the drawings of U. S. patent applications?

A. I should rather think it looked more like a heavy bond paper.

Q. 28. Do you recall what the character of the disks were that formed part of the drum and indicated by the reference letter I in the drawings?

A. I know they were of metal, but could not say what metal they were made of. I remember that all the polished parts were nickel-plated.

Q. 29. What is your recollection as to the approximate total weight of the drum by itself?

A. I could not tell whether certain parts were not removed with the drum at the time, so I could not give any idea of the weight of the drum.

Q. 30. Do you remember whether the disks were of cast metal or stamped sheet metal, or whether of other character of metal?

A. I could not say.

Q. 31. Do you know who constructed the model scale which you used in the making of the drawings for this British patent?

A. I understood from Mr. Wise that the model scale was built by Messrs. William Garden & Sons, who were then located on John street, New York.

Q. 32. What grade of workmanship do you recall as represented by this model scale; that is, what is your impression as to how well constructed it was?

A. It impressed me to be very well constructed.

Q. 33. About how long did that model scale remain at your office?

A. At least three or four days.

Q. 34. Did you see it again after it was taken away from your office?

A. No, sir.

Q. 35. Have you any particular reason to give for your clear recollection of this particular apparatus or your ready recognition of these drawings of the British patent?

A. More so than for an ordinary job, the reason being that Mr. Wise was around the office during all the time that the work was in progress and a good deal of talk about it had been going on.

Q. 36. Where you mentioned the paper of the drum as looking "more like a heavy bond paper," did you mean something heavier or lighter than the ordinary bristol board used for U. S. patent applications?

A. Much lighter.

Direct Examination closed.

Cross-Examination by Mr. Scott.

XQ. 37. Of what material was the beam made; the beam is lettered B in Figure 1 of the drawing?

A. It was made of metal, but can't recollect whether it was a casting or cut out of stock.

XQ. 38. On Figure 1 of the drawing, under the letter B, I notice what appears to be a cylinder, which cylinder apparently being mounted on a screw-threaded rod; do you remember what that cylinder was, and of what made?

A. I don't remember.

XQ. 39. Do you remember whether it was of metal or of some other substance?

A. It was apparently of metal.

XQ. 40. Do you know what its purpose or function was?

A. If I have known I was not called upon knowing, except indicating it in the Patent Office drawing, as shown on the model before me, from which I made the original drawings.

XQ. 41. Do you remember what the wheel lettered J, shown in Figures 1 and 2, was for?

A. I remember it was a hand wheel.

XQ. 42. What effect did it have when the wheel was turned?

A. Its object was to turn the drum G, which is mounted on shaft H, to which the wheel G is also fastened.

XQ. 43. Do you remember what the spur wheel K was for?

A. The spur wheel K, which meshes with pinion L, which is mounted on screw M, has for its function to move the nut Q along an indicating scale placed immediately below that screw M.

XQ. 44. Do you remember how the cylindrical shell G was secured to the disks I?

A. It was apparently cemented to it.

XQ. 45. Do you state that from your recollection of the scale or from the appearance of the drawing which you have before you?

A. I remember having had the drum before me with a paper thereon and I had some separate sheets, from which I have drawn the charts which are indicated in the drawings before me. But of the fact I remember there has never been any question about removing the paper that was on the drum, and I paid very little attention as to the way it was fastened on the flanges.

XQ. 46. Can you state from your recollection of the model

scale whether the sheets upon which the numerals were printed constituted the entire cylindrical shell of the drum or whether this sheet bearing the figures was backed by some other sheets in forming the cylindrical drum? I mean, did you examine the structure of the completed drum of the model scale in such a way that you can be certain now whether the cylindrical portion was the single printed sheet or whether that single printed sheet was pasted over a backing of some kind?

A. I did not remove the sheet from the drum, and I must have evidently been told that the construction was such as indicated on my drawing, this work being done in the presence of the inventor, whose directions for the details of the work I followed very closely.

Mr. Scott: In view of the witness's last answer, all of his testimony relevant to the thickness or character of the paper shell of the cylinder is objected to as hearsay evidence, it appearing that the witnes himself never investigated this subject or had any personal knowledge regarding it.

XQ. 47. Have you any recollection at this date as to the approximate length of the cylinder which formed part of this scale shown in the Wise patent?

A. If I remember right, the cylinder was about 12 or 15 inches long.

XQ. 48. Do you remember whether the shell G of the cylinder was supported intermediate of its ends, or was only supported at its ends by the disk I?

A. It was not, from what I can remember.

XQ. 49. Did this cylinder seem to have a true cylindrical shape, or was it distorted at all?

A. It seems to be perfectly true.

XQ. 50. Did you ever know, Mr. Netter, of any of these scales such as shown in the drawing of the Wise patent, and like the model which you have referred to being used in the actual course of business?

A. Only recently.

XQ. 51. What particular scales do you refer to as having seen recently?

A. I cannot recollect any especial make; I never examined them very closely.

XQ. 52. You can't say, can you, that you ever saw a scale in actual use constructed and operating like the model scale referred to and that shown in the Wise patent?

A. No, sir.

XQ. 53. As I understand this Wise scale, the gear K, the

hand wheel J and the two disks I forming the ends of the cylinder, were all fastened rigidly to the shaft H; is that correct?

A. It is.

XQ. 54. Do you remember anything now as to the construction of the gear wheel K; that is, did it have milled teeth.

A. I am pretty certain they were.

XQ. 55. From the drawing which you made for the Wise patent, and a copy of which is before you, what is the best idea you can now give us as to the probable thickness of the spur wheel K which formed part of the model scale?

A. I should say about a quarter of an inch.

XQ. 56. Do you remember whether it was a solid disk or a wheel with spokes or openings of some kind?

A. Evidently openings the drawings show in Fig. 4, or I would not have taken the trouble to show the effects, which, this being only a detail, indicates how closely I followed the construction of the model.

Cross-examination closed.

Redirect Examination by Mr. Davis.

RDQ. 57. Did you handle the drum yourself when It had been taken out of the scale?

A. I did.

RDQ. 58. And from your handling of this drum and inspection of the same, what were you able to determine as to how the paper composing the cylindrical part of the drum compared with these separate sheets that you say you also had before you in making the drawings?

Mr. Scott: Question objected to as leading, as the witness has not said that he was able to determine anything from the comparison referred to.

Mr. Davis: Excepted as an erroneous statement of the witness' previous testimony, which, if counsel sees fit to refer to in an objection of this character, ought to be quoted in the language of the witness.

A. It was evident that they were all the same quality of paper and color.

RDQ. 59. And was it also evident that such a sheet of paper itself composed the cylindrical part of the drum alone?

Mr. Scott: Objected to as being grossly leading.

A. Yes.

Redirect examination closed.

Re-cross-Examination by Mr. Scott.

RXQ. 60. What do you understand by the word "composed?"

A. I understand that the sheet of paper with the end disks composed the cylinder.

RXQ. 61. Did your examination of the cylinder enable you to say that something else may not have entered into its composition besides the end disks and the single sheet of paper on which the figures were printed; I mean by this, are you able to state positively now that the paper upon which the chart was printed may not have been mounted upon a shell of paper or other substance in order to stiffen it?

A. I don't believe there was anything else but the paper forming the drum with the end disks.

RXQ. 62. Are you able to state positively that the single sheet of paper on which the figures were printed was the only sheet of paper going to make up the cylindrical shell; that is, did you investigate the cylinder to such an extent as to be sure that there was only a single sheet of paper extending around the end disk?

A. While I can't say that there was but one sheet of paper around the disk, I am certain that there was nothing but paper.

A. That is so.

Examination of witness closed.

ANNIE G. CARTWRIGHT, a witness produced on behalf of defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Davis.

Q. 1. Please state your name, age, residence and occupation.

A. Annie G. Cartwright; age, 39; residence, 170 West 89th street, New York City; occupation, treasurer William Gardam & Son.

Q. 2. Will you please state for how long a time you have been connected in a business way with this firm of William Gardam & Son?

A. I entered the business in 1887, and remained there until about February, 1895; and then I entered the business again in September 1901, and have been there up to the present time.

Q. 3. What sort of work were you doing for Gardam & Son at the time you left in 1895?

A. I worked on the books.

Q. 4. Do you know of work having been done by Gardam & Son for one Edward W. Wise during a time when you were employed on the books of Gardam & Son?

A. Do I remember—yes.

Q. 5. Can you point to any record of Gardam & Son which will show when work was done for this Edward W. Wise?

A. I have here a bill book, the original press copy. At page 448, under date of August 21, 1894, is a copy of the original bill as follows:

"Aug. 21st 4
8500 198

" r. Edw. W. Wise,

To making drawings for and building (1) Model of Wise Patent Computing Scale Beam attachment as per order		267.20	
" printing of table &c		20.50	
" (1) Howe Scale #594		16.63	
" outside experts time		5.00	
		$309.33	
July 23rd By Cash on account	$100.00		
" 20th " " "	16.63		
Aug. 13th " " "	100.		
		216.63	
			$92.70
To 1 Telescope Valise			2.50
			$95.20"

And at page 452 there is similar copy of an original bill, which reads as follows:

"Aug. 21st 4
8500 198

" r. Edw. W. Wise,
To making drawings for and building (1) Model of Wise Patent Computing Scale Beam attachment as per order 267.20
" printing of table &c 20.50
" (1) Howe Scale #594 16.63
" outside experts time 5.00
" (1) Telescopic Valise 2.50
" altering (1) loupe for scale & ring on loupe 3.90

$315.73

July 23 By cash on account 100.00
" 20 " " " (scale) 16.63
Aug. 13 " " " 100.
" 31 " " " .40 217.03

Balance $98.70
Paid by Edw. W. Wise $17.03
Balance due from Ed. Wise 40.79
" " " Company 57.91 $98.70"

On page 459 is another bill with the same matter, which reads as follows:

Sept. 5th 4
8528 200

" r. Edw. W. Wise
Aug. 31 To box for (1) Scale &c. 105
" packing same 2¾ hrs. at 45c. per hour 123 $2.28"

Q 6. Please state what the bookkeeping system was at that time in Gardam & Son's place of business.

A. The foreman took the time from the men and charged it up to the different jobs, and then it was transferred to a time book, from which the bills were made, and copied in

this bill book, from which it was then posted into a sales book, and then entered into the ledger.

Q. 7. Do you remember whether or not this work was done for this man Wise as billed in these three statements that have been copied into the record, was the first work that Gardam & Son had ever done for this man?

A. Yes, so far as I remember.

Q. 8. What do the books of Gardam & Son show as to how long a time elapsed after the doing of this work in 1894 before any other work was done for this same Mr. Wise?

A. That no other work was done until 1900.

Q. 9. Do you recall this work done for Mr. Wise, independently of what this bill book shows—that is, do you remember it?

A. Remember the work being done? Yes, I do.

Q. 10. Can you refer to any circumstance or happening occurring in your life by which you are enabled to fix the time when this work was done for Mr. Wise?

A. Yes, the model was made before I was married in February, 1895.

Mr. Davis: The bill book from which the witness has read is submitted to counsel for complainant for his inspection.

Direct examination closed.

No cross-examination.

JOSEPH W. A. GARDAM, a witness produced on behalf of defendant, being first duly sworn, testifies as follows:

Direct Examination by Mr Davis.

Q. 1. Please state your name, age, residence and occupation.

A. Joseph W. A. Gardam; age, 40; residence, Arlington, Hudson County, State of New Jersey; occupation, superintendent of William Gardam & Son.

Q. 2. Will you please state how long you have been connected in business with William Gardam & Son?

A. About twenty-five years.

Q. 3. What sort of work were you engaged upon while in the employ of that firm during the early nineties?

A. Model and experimental work, and general machine work.

Q. 4. I invite your attention to "Defendant's Exhibit Wise British Patent No. 678 of 1895," and will ask you to

state whether you have heretofore been familiar with such a construction of computing mechanism as is illustrated and described in that patent, and if so, how you first became familiar with it.

A. I did the bulk of the work on the model that these drawing were made from under Mr. Wise's supervision.

Q. 5. About when was it, according to your best recollection, that you did the work you speak of upon that scale?

A. We started about December, 1893, and the scale was finished in May or June of 1894.

Q. 6. About how much work was done for Mr. Wise during this period which you mention?

A. There were several scales made for Mr. Wise, embodying the principle shown in the British patent prior to December, 1893.

Q. 7. What do you recall as to constructions of cylinders or drums that were employed in any of these Wise scales that were built by Gardam & Son?

A. The original scales were made with a metal or tin drum, which were found to be too heavy, and the scale as finished had a paper drum.

Q. 8. How did this scale of the kind illustrated in the British patent rank in point of time with the various scales that were made for Wise during the period you have mentioned?

A. This was the last of that class of scale.

Q. 9. Will you please state in just what the drum of that last scale consisted?

A. The ends were made of aluminum, were worked out of solid material, paper was then wound around one or more times to make a backing or drum for the paper computing chart.

Q. 10. Please state by use of the reference character what part or parts, as shown in the drawings of the British patent, were made of aluminum?

A. The reference letter I was made of aluminum and pinned securely to shaft H.

Q. 11. Do you remember how many of those aluminum disks were employed for the drum?

A. Three, one at each end and one in the center.

Q. 12. Do you recall in what manner the paper was secured to those aluminum disks?

A. The end and center pieces were first shellaced and then the paper was shellaced on the edges and a strip through the center, to correspond with the support, and then wound

around these ends and center support one or more times to make a drum or cylinder.

Q. 13. What is your best recollection as to the approximate thickness of the aluminum disks that were used in that scale?

A. They were not over 1/32 of an inch in the flanges and rims, but approximately half inch diameter at the hubs.

Q. 14. What is your best recollection as to the thickness of the cylindrical part of the drum, including the paper backing and the paper chart?

A. Approximately 1/64 of an inch.

Q. 15. Did you do the work yourself upon the drum of this Wise scale which you have been describing?

A. I did, with Mr. Wise's help.

Q. 16. When the last work had been done upon this scale, did you operate it or see others operate it?

A. Mr. Wise and I operated the scale for some time, weighing different materials of different weights.

Q. 17. How well did the scale operate?

A. The scale operated perfectly.

By Defendant's Counsel: To this, as well as the foregoing question, objection is entered that they are immaterial and irrelevant, as having no bearing upon the issues of the case.

Q. 18. Where was the firm of Gardam & Son located at the time the Wise scale was built?

A. At 96 John street and 19 Platt street, New York City.

Q. 19. Do you know what became of that scale?

A. When completed it was boxed and shipped to either Las Vegas, New Mexico, or Erie, Pennsylvania.

Q. 20. Can you produce anything that illustrates the construction of this scale, aside from the British patent referred to?

A. I have a photograph of the scale given to me by Mr. Wise.

Q. 21. About when was it that you first received this photograph?

A. In May or June of 1894.

Q. 22. In whose possession has the photograph been since the time when you first received it from Mr. Wise?

A. In my possession.

Q. 23. Can you refer to any circumstance or event in your life which will assist you in fixing the time when you did the work on this scale shown in that photograph?

A. Yes, this scale was finished some six or seven weeks before I was married.

Q. 24. What was the date of your marriage?
A. July 25, 1894.
Q. 25. Do you know what became of Mr. Wise?
A. He died in Los Angeles, I believe, about 1900.
Q. 26. Do you remember who kept the books of Gardam & Son in 1894?
A. Yes, my sister was bookkeeper.
Q. 27. What is her name?
A. Mrs. A. G. Cartwright.
Q. 28. How was the drum or cylinder of the scale shown in the photograph you produced, operated?
A. It was driven by a hand wheel, which turned a large gear meshing or running in a pinion that is fastened to the screw which drives the poise along the beam, or it can be driven by pushing the poise along the beam, thence rotating the screw and pinion through the large gear.
Mr. Davis: The photograph produced by the witness is offered in evidence, and the Examiner requested to mark the same "Defendant's Exhibit Wise Photograph."
Direct examination closed.

Cross-Examination by Mr. Scott.

XQ. 29. Mr. Gardam, will you state what the object is below the letter B in Figure 1 of the drawing, this object being shaded apparently to represent a cylinder, and apparently having a screw-thread engagement with a horizontal rod?
A. This is a counterweight.
XQ. 30. Do you remember what this counterweight was made of?
A. The outside was a piece of brass tube, and my recollection is that the ends were made of sheet brass, securely fastened in the tube and then filled with lead.
XQ. 31. Completely filled with lead?
A. My recollection is such.
XQ. 32. What is your recollection of the length and diameter of this cylindrical counterweight?
A. It was about 3 inches in diameter and 3½ to 4 inches long.
XQ. 33. Do you remember the material of which the spur wheel K was made, this spur wheel being shown in Figs. 1, 2, 3 and 4 of the drawings of this Wise English patent and also being shown in the photograph referred to by you on direct examination?
A. It was made of brass as light as possible.

XQ. 34. Of what material was the hand wheel J made?

A. That was also made of brass, a casting, I believe.

XQ 35. In this scale shown in the photograph and English patent, was the revolution of the cylinder in any way affected by the weight of the object placed upon the platform for the purpose being weighed?

A. When a weight was placed upon the platform of the scale, the cylinder was then turned either by the hand wheel or by pushing the poise along the beam; it would then register the weight and amount per pound of the object on the platform.

XQ. 36. Merely placing the object upon the platform had no effect upon the cylinder in the way of causing it to revolve?

A. No.

XQ. 37. The scale would have weighed just as well, would it not, if the cylinder had been taken off and the cylindrical poise at the left adjusted to balance the beam?

A. Yes, it would then have been a common scale.

XQ. 38. Did you ever see any scales like that shown in the photograph you have referred to and in the English patent in actual use in the course of ordinary business or on the market for sale?

A. No, not prior to making this one.

XQ. 39. Did you afterwards ever see any scales in actual use in the course of trade or on sale, that is, after making the model?

A. I never saw any of Wise's scales on the market.

XQ. 40. Did you ever see any on the market like this scale you have been testifying about, whether made by Wise or anybody else?

A. None, excepting the computing scales as are used today.

XQ. 41. In these computing scales that are used today, the cylinder is rotated by the weight of the object placed upon the platform or platter, is it not?

A. Yes, I believe that is the construction. I have not examined them very closely.

XQ. 42. And in this respect they are different from the Wise scale, are they not?

A. Yes.

XQ. 43. Did you ever measure the thickness of the paper forming the cylindrical shell of the cylinder of the Wise model scale?

A. No, not definitely. It would be about the thickness of ordinary wrapping paper on the drum.

XQ. 44. Do you remember where this paper came from that was used on the Wise model scale?

A. My recollection is that we cut it from a sheet of wrapping paper the same as we used in our business.

XQ. 45. Why was it you took wrapping paper for that purpose?

A. I don't know of any particular reason.

XQ. 46. I suppose wrapping paper just happened to be handy for that purpose, so you used it?

A. I would imagine so; I believe Mr. Wise selected the paper.

XQ. 47. You don't remember much about it, do you?

A. Not much about the kind or quality of paper; Mr. Wise was looking after that.

XQ. 48. I understand from your previous answers that you never saw one of these Wise scales like the model or in this patent drawing in actual use in course of trade or on sale prior to 1896; is that correct?

A. I do not know that I specified any date.

XQ. 49. Well, what is the fact in regard to my last preceding question?

A. I was not particularly interested in computing scales, and therefore was not as observant as I might have been as to the time or dates. In other words, I don't recollect whether there was or was not any made; there may have been for all I know.

XQ. 50. Do you remember seeing any scale having a rotary computing drum other than the model which you have testified about prior to the year 1897?

A. None, except what we made for Mr. Wise.

Cross-examination closed.

Redirect Examination by Mr. Davis.

RDQ. 51. Can you state about what the weight of the drum was, taken by itself, without the gear wheel that is designated K in the drawings of the British patent, and without the hand wheel that is designated J in said patent?

A. Probably a pound, or thereabouts.

RDQ. 52. Do you recall whether in the scale there was a glass such as is designated X in the drawings of the British patent, and the rate strip that is designated V in said patent?

A. There was a glass strip in the outer shield and a rate strip of cardboard or bristol board underneath the glass.

RDQ. 53. What was the purpose of resorting to aluminum for the disks of the drum?

A. For lightness.

Redirect examination closed.

Examination of witness closed.

Adjourned to Toledo, Ohio, Saturday, January 27, 1912, at 10 a. m., before Solon T. Klotz, Notary Public for Lucas County, Ohio, in The Nicholas, Toledo, Ohio.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

The Computing Scale Company
vs.
Toledo Computing Scale Company. } In Equity. No. 30,024.

State of New York,
City and County of New York. } ss.

I, C. E. Davidson, a notary public in and for the County of New York and State of New York, do hereby certify that the foregoing depositions of Raphael Netter, Annie G. Cartwright and Joseph W. A. Gardam were taken on behalf of the defendant, Toledo Computing Scale Company, pursuant to the annexed notice, before me at the offices of Messrs. Fish, Richardson, Herrick and Neave, No. 5 Nassau Street in the City and County of New York on the 25th day of January, 1912; that each of said witnesses was by me duly sworn before the commencement of his or her testimony; that each of said witnesses read his testimony before signing the same; that I am not connected by blood or marriage with either of the said parties nor interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at New York City, in said County, this 2nd day of February, 1912.

C. E. DAVIDSON,

(SEAL) *Notary Public (No. 9), New York County.*

Toledo, Ohio, January 27th, 1912, 10 a. m.

Met pursuant to adjournment, before Solon T. Klotz, Notary Public in and for Lucas County, Ohio.

JOHN H. MILBURN, a witness recalled to testify on behalf of defendant, being first duly sworn, testified as follows, in answer to questions put by Mr. Davis:

Present:

C. A. Richmond, for complainant.

F. P. Davis, for defendant.

Q. 1. Are you the same John H. Milburn who previously testified in this case?

A. Yes, sir.

Q. 2. Since the giving of your former deposition, have you made any effort to discover one of the scales that you referred to in that previous deposition as having been manufactured by you at St. Louis in 1893 or 1894, such scales having a computing drum?

A. Yes, sir.

Q. 3. Will you please state what efforts you have made to discover one of these scales?

A. I went from Detroit to Dayton, started in to look up one of the original scales that I sold to a party there by the name of Ott Kaylor, but he had sold out his business, also the scale; then I traced it to a man that had bought it from him by the name of George Ziegler, living on Eaton Pike. I went up there to his residence, but found him absent in Kentucky. I went from there to a man by the name of Joseph Mullin that handled some of the groceries that were in the grocery business that was sold out to this man Ziegler, who then referred me to a man by the name of Joseph Mullin, living in Alpha, Ohio. Located Mr. Mullin there, found out by him that he had sold out to another man living in Beaver, by the name of Thorndale. Being too late to catch any car out there that evening, I turned the matter over to my son for him to go out to Thorndale. That was about the last I knew of it until I had correspondence with him. By his correspondence he kept me in touch with what he was doing along the line.

Q. 4. Can you state what use had been made of that scale prior to the time you sold it to Kaylor?

A. When I left Beaver Falls I thought I would take a

change in vocation, and I bought a grocery store located at the corner of National and Home avenues, Dayton, Ohio. I took my scales with me that we have referred to, and done all my business of weighing on the said scale.

Q. 5. Do you remember whether in the use of that scale in your grocery store you did computing?

A. Yes, sir, yes.

Q. 6. Please look at "Defendant's Exhibit Milburn Envelope," and state what you know about it.

A. That is the same scale I have reference to that is shown on the envelope.

Q. 7. Where is the computing part of that scale shown?

A. The fractional computing part is on the upper beam; the lower, or rather the computing part computing the even pound, is suspended in underneath the shelf of the scale.

Q. 8. Do you refer to that part which is denoted on the envelope by a lead line and cross?

A. Yes.

Q. 9. Please describe briefly what that computing construction is.

A. The outside shell is made of brass; the inner skeleton which holds the printed matter was made on a form with several layers of paper cemented together, and the printed matter was on the outside of that, glued. The paper drum when finished then was mounted on two end pieces with a rod running through the center of the drum. One of the end pieces had a hole tapped to receive the threaded rod. The other part, or the turning end where the thumb knob is, was a clearance hole with a set-screw coming down on the rod to hold it in place.

Q. 10. How was that computing device used?

A. Well, it was used for the number of pieces, or dozens, grosses or pounds; it was used as a general computer. It could be used whether you were weighing on the scale or not.

Q. 11. In what way was it handled?

A. The price per pound was arranged on the outer margin; along the top was a strip denoting the pounds; in order to compute, the cylinder was revolved around to a given price per pound and then it was followed down from the upper figure, through an opening in the drum, and would give you the exact amount or value of the piece weighed or counted.

Q. 12. What material was used for the strip you spoke of?

A. It was a printed strip, paper, running from one up to fifty pounds.

Q. 13. Was the opening in the casing covered in any way?

A. Yes, there was a piece of glass running through to protect the dust and dirt from going in.

Q. 14. Did you search anywhere else than at Dayton for one of your St. Louis scales or parts thereof?

A. Yes. I made a trip to Middletown, Ohio, by request of a man that said he thought he saw a scale down there that tallied with my description, but I found out it wasn't my scale at all; it was another maker's. I went on the same errand to Xenia, which was a failure. Also to Alexandria, which amounted to the same thing. These places were all told me by parties that thought, after explaining the scale to them, that that was the one; so, to make sure and not miss anything, I went down to all these places, without results.

Q. 15. Did you also search among your own belongings, and if so, with what result?

A. Yes. If I would figure all the time I have spent since going into this matter, it would amount to a good many hours. I finally uncovered one of the original sketches of the chart that was used in the Milburn computing scale manufactured in St. Louis. I also found one of the end pieces that supports the chart.

Q. 16. Can you produce the chart sketch to which you just referred?

A. Yes, sir. I hold it in my hands. It is dated March 14th, 1894. Also two of the number strips was with it. I have also here one of the end pieces that I have referred to as holding the skeleton of the chart.

Q. 17. In whose handwriting is the date entry on this chart sketch?

A. My own writing.

Q. 18. And whose signature is that which appears just above the date entry?

A. That is my signature.

Q. 19. Please state briefly what this chart sketch represents and what use was made of it.

A. I made this sketch for the purpose of getting a wood cut made from it. I don't remember the name of the party that made the cut, but it was made in St. Louis, I think by a man on Broadway.

Mr. Davis: The chart sketch produced by the witness is

offered in evidence, and the examiner is requested to mark the same "Defendant's Exhibit Milburn Chart Sketch."

Mr. Richmond: Objected to as irrelevant and immaterial to the issues involved in this controversy.

Q. 20. Do you remember how soon after the making of that chart sketch a woodcut was made?

A. Yes; it was made within two weeks after the sketch was sent to them.

Q. 21. When was your signature put upon the chart sketch, and when was the date put there?

A. That was the date that I finished the drawing.

Q. 22. Did you put your signature and this date on at the time you completed the sketch?

A. Yes, sir.

Q. 23. How does the paper of that chart sketch compare with the paper that was used in constructing the shells or cylindrical portion of the computing drums of your St. Louis scales?

A. I think that is the same paper that we used for the making up of the drums; in fact, I think that is what it was bought for, that paper.

Q. 24. How does the paper of those number strips you have produced compare with the paper used for the printed charts of those St. Louis drums?

A. They are the sme paper, the same paper was used.

Mr. Davis: The number strips produced by the witness are offered in evidence, and the Examiner is requested to mark the same "Defendant's Exhibit Milburn Number Strips."

Mr. Richmond: Same objection.

Q. 25. What is the nature of that end piece which you produced, and how was the paper fastened to such end pieces in the St. Louis drums?

A. If you will notice, there is a shoulder on each end piece that fits exactly on the inside of the skeleton. The rod is then put through the clearance end, screwed into the back end form, then the clearance end is pressed into the inside of the skeleton, held there by a set-screw.

Q. 26. Where you use the word "skeleton" here, do you refer to the paper shell?

A. Paper shell, yes, sir.

Q. 27. Which description of end piece is this which you have produced,—the kind you have spoken of as the back piece with the clearance hole, or the kind with the tapped opening for the screw-threaded part of the rod?

A. This one here is the tapped piece .

Mr. Davis: The end piece produced by the witness is offered in evidence, and the Examiner is requested to mark the same "Defendant's Exhibit Milburn Drum Head."

Mr. Richmond: Same objection.

Q. 28. Did you manufacture scales with computing drums such as those you have described, and of which that end piece or drum head represents a part, after leaving St. Louis in 1894?

A. Well, I had a private experimental room of my own always, and I did experiment on several drum scales; in fact, I talked of getting out a patent on one, what I call the "Springless Drum Scale." Of course, at that time, and probably most of them at the present time, are using springs as the resistence, where I was using gravity; but I didn't go any further with it, thinking I might come in conflict with the Toledo people.

Q. 29. Is this head piece or drum head which you have produced here one of those which you had at St. Louis?

A. Yes, sir.

Q. 30. Do you remember whether any of the scales that you made at St. Louis having a computing drum such as you have described, were in actual use in any store or stores before you left St. Louis, in 1894?

A. Yes, sir.

Q. 31. Do you remember about how many of such scales were in such use?

A. No, I couldn't give a definite account of that. I have no way of telling, because I have no books or anything to refer to in the business.

Q. 32. Do you remember whether there was more than one such scale in use before you left St. Louis in 1894?

A. There must surely have been a half a dozen or more, in and around St. Louis, of course.

Q. 33. Do you remember whether this scale with that computing drum which you used in your grocery store at Dayton was one of those that had previously been in use or around St. Louis?

A. That was one of the scales I made,—about one of the first ones,—I made while in St. Louis.

Direct examination closed.

Cross-Examination by Mr. Richmond.

XQ. 35. When you used the scale like that shown on "Defendant's Exhibit Milburn Envelope" at your grocery store in weighing goods, did you always use the drum at the lower part?

A. If we wanted to compute, we used the drum.

XQ. 36. Then you sometimes weighed goods on the scale without using the drum at all, did you?

A. Yes, sir, when it was not necessary to get the value.

XQ. 37. How many movable poises were there on this scale?

A. Why, there was four weighing poises, and then there was what they call a scoop poise for balancing a scoop on the platform. Altogether, five movable poises.

XQ. 38. I take it that the lower left-hand poise was the one that balanced the scoop?

A. Yes, sir.

XQ. 39. Please tell what was done by the poise to the right of that?

A. That was the weighing poise, weighing, I think, to fifteen pounds on the beam. The other upper poise was used for the same purpose up to five pounds. The two uppermost poise running along the chart were the fractional computing poise.

XQ. 40. Suppose a ham weighed sixteen pounds and ten ounces, and the price was 18 cents a pound, please tell just how you would weigh it on this scale and get the total charge for the ham.

A. Well, you simply set the scale at sixteen pounds on the weighing beam, then for your fractions of a pound, the ten ounces, you get right on the upper chart. Then you revolve your cylinder here below, showing 18 cents per pound price, the number of pounds is on the upper bar or printed strip at 18 cents a pound, you look below the number of pounds weighed and that gives you the value of the exact even pounds. Then you add the fractions to the even pounds and that gives you the price of sixteen pounds ten ounces of ham exactly.

XQ. 41. Why are there two poises in connection with the upper chart?

A. The divisions was put there in order to lessen the size of the chart. The chart run from 5 cents per pound up to a dollar, and in order to eliminate the width of that chart it was

divided in two, giving the lower prices at the left-hand and the higher prices at the right-hand.

XQ. 42. Then the two upper poises are of different weights, are they?

A. Yes, sir.

XQ. 43. You say this chart that you made that has been produced in evidence was made for the purpose of getting a wood cut from it?

A. Yes, sir.

XQ. 44. Did you ever get a wood cut made from it?

A. Yes, sir.

XQ. 45. Do you know what became of it?

A. No, I do not, unless—I suppose that could be traced, too. I will tell you in a minute. Mr. Cross, of Alton, Ill., might give some light on that, and probably know where that cut is.

XQ. 46. Were charts printed from that wood cut?

A. Yes, sir.

XQ. 47. Are you sure it was a wood cut, that is, a wooden block engraved by hand?

A. Then there was a stereotype taken from that.

XQ. 48. Was Mr. Cross the man who made the wood cut?

A. No, he was interested in the Milburn Computing Scale Co.

XQ. 49. Who was it that made the wood cut, and where was it made?

A. It was made in St. Louis, I think, on Broadway somewhere, but I couldn't tell the man's name exactly. It has been twenty years ago, and a fellow loses track of these things.

XQ. 50. About how many ticknesses of paper like this "Defendant's Exhibit Milburn Chart Sketch" paper did you use in making your drum?

A. It was three or more layers.

XQ. 51. And did you have the paste or mucilage between all the adjacent layers?

A. Yes, sir.

XQ. 52. Were the charts printed on this same kind of paper?

A. No.

XQ. 53. Then you made the drum by wrapping three or more layers of this paper like the chart around a form, pasting the adjacent layers together, and then outside of this you pasted the printed chart; is this correct?

A. Yes, sir.

XQ. 54. This scale of yours that you used in your Dayton

grocery store, had it ever been used at all before you put it into use there?

A. No, sir.

XQ. 55. When you left St. Louis were there any other similar scales in your stock that had not been sold up to that time?

A. Yes, there were.

XQ. 56. How many?

A. I couldn't say exactly.

XQ. 57. About how many, something like half a dozen?

A. Oh, yes, there was that many anyway.

XQ. 58. What became of them?

A. That I don't know.

XQ. 59. Did they pass out of your possession?

A. Yes, sir.

XQ. 60. Who took possession of them after you parted with it?

A. Don't know. Simply left them go it themselves. I didn't bother my brains about it at all after I left. I got enough of the people that were with me, and it wasn't a very nice parting of the ways.

XQ. 61. In the scale made at St. Louis, and shown on the envelope, and used by you in the Dayton grocery store, there was no connection whatever, was there, between the poise or other mechanism of the scale and the cylinder which bore the value indications?

A. No. You see the idea was it could be used off the scale altogether for a computer.

XQ. 62. There was not even a pointer connected with the scale that pointed automatically to the proper part of the cylinder at which the reading was to be made, was there?

A. No.

XQ. 63. The computing cylinder shown at the base of the scale in the picture on the envelope would have answered exactly the same purpose, would it not, if it had been mounted on a separate base altogether and not in any way connected to the scale?

A. Yes.

XQ. 64. The cylinder was not moved automatically, but only moved independently by hand, was it?

A. Yes, that is the idea.

XQ. 65. Did you ever make any attempt to produce a scale in which the computing cylinder would be automatically revolved by the weight of the object placed upon the platform of the scale?

A. Yes, sir.

XQ. 66. When and where did you first make any such attempt?

A. The first attempt I made at that was in St. Louis.

XQ. 67. Please describe the construction you had in mind, and how far you went in perfecting it.

A. Well, my idea was to do away with springs, and I used the gravity weight instead, for resistance of the load that was put on the pan and revolve a cylinder to a given point. It worked fairly well, the one I made, but I thought probably there would be some trouble and I would be up against the Toledo people here, and I dropped it, the DeVilbiss scale at that time, it was.

XQ. 68. When was this?

A. I can't tell just exactly the month, it was along in '94, I think, but what part of the year I couldn't say just exactly.

XQ. 69. Do you mean that in this scale that you built at St. Louis in 1894, the cylinder was revolved automatically by the weight?

A. There was a ratchet and pinion revolved the cylinder. The weight, you see, was just a resistance, same as a spring would be.

XQ. 70. Was the weight constant all the time?

A. It wasn't only one weight, it was two weights that pulled out away from one another; there was two weights, one on each side.

XQ. 71. But these two weights were always the same, were they not?

A. Oh, yes, always the same position on the same weight. It was the gravitation, working below the line of gravity.

XQ. 72. Did you have any more reason for thinking you would be up against the Toledo people after you finished this scale than before you commenced work on it?

A. When I commenced work on it I didn't know anything about the DeVilbiss scale at all. I got my idea first on the gravity scale from a cut that I got hold of in some shape or form, I don't know how, think it was made by a man down in Troy, N. Y., in 1878, and I revised it a good deal and put it into the drum scale, and I didn't—well, I made it rough there in St. Louis to give me an idea that such a scale could be made. Then, while I moved to Detroit from New York City, why, I thought of taking it up again. At that time I had been looking at the DeVilbiss scale, and it came into my head that I might be up against an infringement, so I didn't bother patenting the scale.

XQ. 73. Did this scale made by the man down in Troy, N. Y., in 1878, have an automatically revolving drum?

A. No, no. It was just for ordinary weighing, this Troy scale I speak of.

XQ. 74. When was it, as nearly as you can tell, that you had been looking at the DeVilbiss scale?

A. Well, that was, I think, along in '96, I think. I think that was the first time that I looked into the DeVilbiss scale.

XQ. 75. Did you know about the DeVilbiss scale before that time?

A. I had heard of it.

XQ. 76. Did you understand its construction and mode of operation?

A. Yes.

XQ. 77. That is, you understood its construction and mode of operation before you saw it in 1896?

A. I had seen a cut before I seen the scale. That is where I got my idea of it as to how it worked, from the cut.

XQ. 78. Please tell just what you mean by the DeVilbiss scale, what its principle of operation is.

A. Well, instead of springs the DeVilbiss scale is controlled by gravity weight, raising or lowering.

XQ. 79. Is it a computing scale?

A. Yes, sir.

XQ. 80. What kind of a computing element does it have?

A. The form that holds the computing chart is fan-shaped and I think the chart is printed on paper, I think. I am pretty sure.

XQ. 81. Not a drum chart?

A. This is the DeVilbiss scale that I refer to at first. There was no such thing then as a drum scale made only by a Boston concern, I have forgotten the name, at that time.

XQ. 82. Well, then, when you were afraid there would be some trouble and you would be up against the Toledo people

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A. The DeVilbiss, rather, it was then.

XQ. 83. ——with your St. Louis scale that you built in 1894, you were not afraid of any automatically revolving drum that they might have in your way?

A. No.

XQ. 84. But just afraid of the gravity weight proposition, were you?

A. Yes, that was the main thing that I had in view.

XQ. 85. Where did you get your idea of the automatically revolving drum?

A. I just thought it out.

XQ. 86. Had you ever known of such a scale before that time?

A. No, no; I don't remember of hearing of one before that.

XQ. 87. What was the earliest automatically revolving drum scale that was successfully put on the market, to your knowledge?

A. I don't know. I have no idea—I don't just exactly remember when I did see that first scale or hear of it. I would have to think it over. I don't know—can't think just exactly. It strikes me, though, it was when I went to Beaver Falls; that was in '94; it strikes me so.

XQ. 88. Was this drum scale made by the Boston concern that you mentioned a moment ago?

A. I think it is; I think that is the one, yes.

XQ. 89. Is there any way in which you can recall the name of that Boston concern?

A. No, I don't really know, in fact. I have heard it. It was the Boston Supply Co. or something; went under that style or something.

XQ. 90. Do you know the name of any individual connected with that Boston concern?

A. No, sir.

XQ. 91. Did you see one of their scales, or just hear about it?

A. Just heard about it, and saw them on a cut.

XQ. 92. So this was the first commercially successful scale that you knew about that had an automatically revolving drum, was it?

A. Yes, up to that time, that I had heard of.

XQ. 93. Did this scale use weight or springs?

A. Springs.

XQ. 94. Are you pretty sure it was in 1894 that you learned about it?

A. That is to the best of my knowledge, of course. The best I can remember.

XQ. 95. What became of the scale with the automatically revolving drum that you say you built in St. Louis in 1894?

A. Oh, I tore it down. I have parts of it now around the house.

XQ. 96. Then you didn't leave it behind when you left St. Louis?

A. No, sir. All them private matters of my own I packed up in one large case and shipped it to Dayton.

XQ. 97. After you dropped this St. Louis scale as stated by you in your answer to XQ. 67, did you ever take it up again?

A. I didn't drop it until I came to Dayton—that isn't right, either. It was Detroit where I dropped it, in 1898.

XQ. 98. Well, when did you get it as far along as you ever carried it?

A. Why, I developed it to a finer point while I was living in Detroit in '98.

XQ. 99. Do you mean that you constructed it——

A. Reconstructed it.

XQ. 100. ——Do you mean that you constructed it somewhat roughly in St. Louis?

A. Yes, sir.

XQ. 101. And then later on in Detroit you tried to improve it?

A. Yes, sir.

XQ. 102. Please tell as nearly as you can when you first learned how this DeVilbiss scale was constructed and operated?

A. It was along in '94, after I went to Beaver Falls—the latter part of '94.

Cross-examination closed.

Redirect Examination by Mr. Davis.

RDQ. 103. What construction of computing drum did you employ on that automatic scale that you built in St. Louis in 1894?

A. It was practically the same as the general run of the drums that are in use on scales now.

RDQ. 104. How did it compare in construction with the drum that you used on the Milburn scale illustrated on this "Defendant's Exhibit Milburn Envelope"?

A. It was a much lighter one. There was only two layers of paper used there, I think, if I am not mistaken. The skeleton ends which we used for that purpose were very light, made out of, I think, No. 28 brass, I used for that.

RDQ. 105. Do you still have that drum or any part of it?

A. I have not got the chart. That must have got tore up

or burned or something. But I have the brass supports, and probably some other things that I could pick up around, going through a lot of trash I have.

RDQ. 106. Was the scale that you used in your grocery store at Dayton among the things that shipped from St. Louis to Dayton as referred to by you in the course of your cross-examination?

A. Yes.

RDQ. 107. Had the scale been completed before it was shipped from St. Louis?

A. Yes, it was complete.

RDQ. 108. Where you were asked in cross-examination as to whether that scale had been used prior to your use of it in your grocery store and you said no, what sort of use did you understand to be referred to in the cross-question?

A. Well, I thought perhaps it referred to its having been sold to some storekeeper and that I then got hold of it myself.

RDQ. 109. Prior to shipping that scale from St. Louis, had it been tested in any way?

A. You mean tested as to its correctness?

RDQ. 110. Yes, I mean that, and would like you to state what was done with that scale, or in what way was it employed prior to its shipment to Dayton?

A. It was taken and tested out by standard test weights, and the computing device gone over thoroughly and found correct.

Redirect examination closed.

Recross Examination by Mr. Richmond.

RXQ. 111. Do you know whether any of the scales that you made in St. Louis like the one shown on the exhibit envelope, that you left there, were ever afterwards sold or put in use?

A. No, I can't say anything. I don't know anything about it after I left; what they really did do with the stock and tools.

JOHN H. MILBURN.

Adjourned subject to further notice.

State of Ohio, Lucas County, ss.

I, Solon T. Klotz, Notary Public, hereby certify that the above witness, John H. Milburn, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that his deposition was reduced to writing by Mr. W. J. Billingslea in the presence of the said witness, and when completed read over to said witness, and subscribed by him in my presence and in the presence of such of the parties and counsel as attended; that said deposition was taken pursuant to due notice, at the office of Solon T. Klotz, at 921 Nicholas Building, Toledo, Ohio, on the 27th day of January, 1912; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing deposition; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 12th day of February, 1912.

SOLON T. KLOTZ,
Notary Public, Lucas County, Ohio.